Supreme Court, U. S.
FILED
OCT 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-555

RUTH E. BUCK,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: Dr. Bernard E. Donovan - former Superintendent of Schools, Dr. Nathan Brown - former Superintendent of Schools, Dr. Irving Anker - former Superintendent of Schools, G. Gary Sousa - Law Secretary, Sheldon Wein - Teacher at Franklin K. Lane High School, Mary Cohen - Assistant Principal at Franklin K. Lane High School, Morton Selub - Principal at Franklin K. Lane High School, Elizabeth O'Daly - District Superintendent of School District #19, Dr. Jacob Zack - Assistant Superintendent in charge of High Schools, Dr. Beverly Lipschitz - Guidance Supervisor of School District #19, Daisy K. Shaw - Director of the Bureau of Educational and Vocational Guidance, Murray Cohn - Principal - High School of Commerce (now Brandeis High School), Evelyn Konigsberg - former Principal of Washington Irving High School, Charles Foy - Receptionist - Medical Division, Sarah Braphart - Secretary to Medical Director, Dr. Naomi Pool - Acting Assistant Medical Director, Dr. Murry G. Fischer - former Ass't Medical Director, Dr. Sidney Leibowitz - Medical Director, Dr. Sidney Rosenberg - Asst. Superintendent

in charge of Personnel, Dr. Theodore H. Lang - Deputy Superintendent in charge of Personnel, Allegedly Honorable Daniel Gutman - Trial Examiner, each of the afore-mentioned individually and as employees of the Board of Education of the City of New York;

and

THE DIVISION OF HUMAN RIGHTS OF THE STATE OF NEW YORK: Joseph Sperazi - Field Representative, Walter P. Offut, Jr. - Senior Field Representative, Jean MacPherson - Regional Director, Arthur Stern - Area Director, each of the afore-mentioned individually and as employees of the Division of Human Rights of the State of New York;

and

THE COMMISSION ON HUMAN RIGHTS OF THE CITY OF NEW YORK: John Doe and James Doe (said names of John Doe and James Doe being fictitious, their true names being unknown to plaintiff), Robert Perez-Wilson - Acting Chief, Investigations Division, each of the afore-mentioned individually and as employees of the Commission on Human Rights of the City of New York;

and

THE NEW YORK STATE SUPERVISORY COMMITTEE: Norman Frankel - Attorney and former Investigator, Harold G. Israelson, Attorney and former Chairman, each of the afore-mentioned individually and as employees of the New York State Supervisory Committee;

and

THE CORPORATION COUNSEL OF THE CITY OF NEW YORK: Edith A. Gordon - attorney, Charles D. Maurer - attorney, each of the afore-mentioned individually and as employees of the Corporation Counsel of the City of New York;

and

BEST COPY AVAILABLE

THE DISTRICT ATTORNEY OF THE BOROUGH OF BROOKLYN: Jane Jones and John Jones and James Jones and Jack Jones (said names being fictitious, their true names being unknown to plaintiff), each of the afore-mentioned individually and as employees of the District Attorney of the Borough of Brooklyn;

and

THE DISTRICT ATTORNEY OF THE BOROUGH OF MANHATTAN: John Smith (said name of John Smith being fictitious, his true name being unknown to plaintiff), Michael Alan Richman, each of the afore-mentioned individually and as employees of the District Attorney of the Borough of Manhattan;

and

Abraham Mark Levien - Attorney; William Goffen - Attorney; David Lubash - Attorney; Marjorie O'Connell - Attorney; Allegedly Honorable Frederick Backer - Justice of the Supreme Court of the State of New York - Borough and County of Manhattan - individually;

and

others, whose identities are not ascertained.

Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RUTH E. BUCK,
PETITIONER, PRO SE
133-54 AVERY AVE.
FLUSHING, NEW YORK
11355
(212) 539-8015

The Corporation Counsel of the City of New York
Municipal Building
New York, New York 10007

Robert D. Stone, Esq.
New York State Education Building
Albany, New York 12224

Henry Spitz, Esq.
General Counsel
New York State Division of Human Rights
270 Broadway
New York, New York 10007

Hon. Louis Lefkowitz
Attorney General
Capitol Building
Albany, New York 12224

Harrington Harlow, Esq.
800 Third Avenue
New York, New York 10022

Attorneys for Defendants

Marjorie O'Connell, Esq.
864 Willis Avenue
Albertson, New York 11507

David Lubash, Esq.
88-18 Sutphin Boulevard
Jamaica, New York 11435

A. Mark Levien, Esq.
580 Egret Drive
Hallandale, Florida 33009

William Goffen, Esq.
150 Broadway
New York, New York 10038

Respondents, Pro Se.

TABLE OF CONTENTS

Page

Citations to Opinions Below..... 2

Jurisdiction..... 2

Questions Presented..... 4

Central Question..... 3
Related Question..... 4
Constitutionality of State Law..... 5
Related Question..... 6
Racial-Religious Imbalance..... 7
Administrative Hearings..... 8
Related Question.....10
Second Suspension.....13
Severance from Bryant Youth
and Adult Center.....13
Jurisdiction.....13
Current Relief.....14
Dismissals.....15
Award Against Marjorie O'Connell...18
Evidence.....19
Damages.....24
Miscellaneous.....25

Constitutional Provisions, Statutes

and Rules of Court.....28
28 USC 1331.....28
28 USC 1343.....28
28 USC 1981.....29
28 USC 1983.....30
42 USC 1985.....30
42 USC 1986.....32

Constitutional Amendment One.....33
Constitutional Amendment Fourteen..34

Federal Rule of Civil Procedure
26 (a).....34
1.....42

New York State Education Law §2573...35
New York State Education Law §3568...33

By-Laws of the Board of Education
of the City of New York
Section 105.....39

Statement of the Case.....43

Jurisdiction.....44
Facts.....45
The Litigation.....76
The Judgment.....83
The Appeal.....89

Reasons for Granting the Writ.....93

Conclusion.....98

Certificate of Service.....99

Appendix A.....A1

Order of February 10, 1972.....A1
Order of February 17, 1972.....A18
Order of March 10, 1972.....A23
Order of March 14, 1972.....A37
Order of April 19, 1972.....A39
Order of Court dated April 19, 1972.A43
Order of May 8, 1972.....A46
Order of October 20, 1972.....A48
Order of December 15, 1972.....A50
Order of April 11, 1973.....A90
Order of April 11, 1973.....A97
Order of January 7, 1974.....A101
Order of February 26, 1974.....A111
Order of February 26, 1974.....A112
Order of Magistrate of 3/14/74.....A114
Order of December 2, 1974.....A123
Order of January 16, 1975.....A159
Order dated July 16, 1975.....A167

Appendix B.....A190

Decision of Court of Appeals,
Second Circuit.....A190

Order of Court of Appeals,
Second Circuit dated May 19, 1977...A209

Appendix C.....A211

Order of the United States Supreme
Court dated October 16, 1977.....A211

TABLE OF CASES

Bivens v. Six Unknown Named Agents
of the Federal Bureau of Narcotics,
403, US 388 (1971).....14, 92

Buck v. Bernard E. Donovan and
Elizabeth O'Daly, Supreme Court of
the State of New York, County of
Kings, #14195, Sept. 1968.....44

Buck v. Allstate Insurance Company,
U.S. District Court, Eastern Dis-
trict of New York, #76C115.....79

Courtright v. Resor, et al.,
325 F Supp 797.....76

Cox v. Louisiana, 379 US 559 (1964).....76

Kinsella v. Board of Education of
Central School District No. 7 of the
Towns of Amherst and Tonowanda, Erie
County and Ewald P. Nyquist, Commis-
sioner of Education of the State of
New York, U.S. District Court for
the Western District of New York
(2d Cir.)(Oakes, Henderson, Curtin).....77, 95

Leonard v. Sugarman, 464 F 2d 1366
(2d Cir. 1972.....78

Lombard v. The Board of Education
of the City of New York, 503 F 2d 631
(2d Cir. 1975) cert den 95 S Ct 1400....14, 76

McDonald v. Sante Fe Trail Transp. Co., 427 US 273 (1976).....45

Newman v. The Board of Education of the City of New York, 508 F 2d 277 (2d Cir. 1975) cert den 95 S Ct 1447....14, 62, 76

Schlagenhauf v. Holder, 379 US 104 (7th Cir 1964).....77

Shelton v. Tucker, 364 US 479 (1960) quoted in Keyishian v Board of Regents, 385 US 589 (1976).....94

Steward v. Pearce, 484 F 2d 1031 (9th Cir. 1973).....76, 96

Tinker v. Des Moines Independent Community School Disttict, 393 US 503, (1969).....94

Ashton v. Kentucky, 384 US 195 (1969).....95

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.____

RUTH E. BUCK,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ruth E. Buck, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered April 20, 1977, reversing, in a two to-one decision, the judgment of the District Court for the Eastern District of New York and affirming pre-trial dismissals.

OPINIONS BELOW

The opinions of the District Court have not been reported except for one dated April 19, 1972 at 16 F R Serv 2d 112. Unreported opinions are dated: February 10, 1972; February 17, 1972; March 10, 1972; March 14, 1972; April 19, 1972; May 8, 1972; October 20, 1972; December 15, 1972; April 11, 1973; April 11, 1973; January 7, 1974; February 26, 1974; March 14, 1974; December 2, 1974; January 16, 1975; July 16, 1975. The opinion of the Court of Appeals for the Second Circuit is reported at 553 F2d 315. Copies of all of the opinions are appended.

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit dated April 20, 1977 was entered on April 20, 1977. The Order of the Court of Appeals denying petition for rehearing dated May 19, 1977 was entered May 19, 1977. Order of the Supreme

Court extending time to file and serve petition for writ of certiorari until October 16, 1977 is dated August 16, 1977 and a copy is appended. Jurisdiction is invoked under U.S.C. 1254 (1).

QUESTIONS PRESENTED

In a federal action, the gravamen of which is denial of constitutional rights, including denial of right to work as teacher and guidance counselor in New York City public high schools to a White Christian (WASP) persecuted primarily by Jews because of her efforts to exert constitutional rights on behalf of her students, Black students, and because of her refusal to participate in racially oriented illegal teacher strikes, and because of her criticism of supervisors and exercise of other constitutional rights:

CENTRAL QUESTION

(1) May the Board of Education require, upon penalty of loss of job, a pub-

lic school employee to submit to psychiatric examination by its own doctors without any hearing or notice of hearing on the causes for such requirement and without any opportunity to confront any witness(es)?

RELATED QUESTION

(2) May the District Court require psychiatric examination of a plaintiff upon motion of a defendant and upon penalty of dismissal of the lawsuit without adequate showing of cause for such examination and especially where, contrari-wise, the plaintiff's soundness of mind was always apparent in protracted court proceedings? If the court may do so, may it order that such examination be conducted by a psychiatrist chosen on the basis of his race and creed and not make known such ground for selection until after the examination and unfavorable report and without any opportunity for the plaintiff to have

any voice concerning such racial-religious qualification and about whose choice the plaintiff had nothing to say?

QUESTION CONCERNING CONSTITUTIONALITY OF STATE LAW

(3) Was it error for the district court to deny plaintiff's motion and fail to convene a three-judge court concerning the constitutionality of Section 2573(7) of the New York State Education law, the law that dealt with discipline of New York City teachers in high schools and under which plaintiff was fired, especially in view of the fact that two sister New York State Education laws, Sections 2569(j) (7) and 3020(a), those dealing with discipline of New York City teachers in elementary and junior high schools and with similar provisions had already been declared unconstitutional? Was it further error, especially in the light of the district court's having certified, pursuant to 28 U.S.C. §1292 (b) that the denial should have been immed-

iately appealable, for the Court of Appeals to merely state, without explanation, that it need not reach the issue?

RELATED QUESTION

(4) Based upon the above-mentioned question of constitutionality of New York State Education Law 2573(7), is the By-Law of the Board of Education of the City of New York, Section 105, under which plaintiff was fired and which is based upon the provisions of New York State Education Law 2573(7) likewise unconstitutional?

QUESTION CONCERNING DENIAL OF PETITION FOR REHEARING

(5) Should the petition for rehearing to the Second Circuit Court of Appeals concerning its reversal of the district court's award have been granted upon a showing of misapprehension of facts, the misapprehension being the court's decision that it was plaintiff's absence from the Board of Education meeting in July 1970 when it voted to dismiss her, and not the Board's

denial of due process, that caused her loss of job; when, in fact, plaintiff was not absent but present at the meeting and addressed the Board members, and especially in view of the fact that plaintiff, in the lower court had moved for production of the tape recording of her voice at that meeting which was denied as a "fishing expedition" and which, upon appeal, was met by the Second Circuit's decision, without explanation, that it need not reach the issue?

QUESTION CONCERNING RACIAL-RELIGIOUS IMBALANCE OF THE PROFESSIONAL STAFF

(6) In the light of the district court's finding of anti-Protestant remarks at official meetings, of denial of due process to plaintiff causing loss of her job, of the allegations that the Board of Education practices discrimination against White Protestants and Blacks, lacks White Protestants on its staff; also in view of the finding of civil rights violation in

the New York City public schools by the United States Office of Civil Rights in 1977 (of which petitioner asks this court to take judicial notice) and in view of plaintiff's allegation of persecution almost exclusively by Jews, do the facts support the contention that Jews hold an inordinate number of professional jobs at the expense of others, especially White Protestants, and if not, is there sufficient basis for discovery or investigation or for consideration of civil rights matters along the lines of the identifiable groups of Jew and Gentile and not solely as Black and White?

QUESTION CONCERNING ADMINISTRATIVE HEARINGS WITHIN THE BOARD OF EDUCATION

Did the district court err and/or abuse its discrition when it failed to look into violation of petitioner's constitutional rights in the administrative hearings held at the Board of Education in 1970 under Trial Examiner Daniel Gutman, and which

resulted in petitioner's dismissal from her tenured position:

(7) when the procedure used violated Section 105 (3) of the By-Laws of the Board of Education at the points when petitioner asked twice, according to those by-Laws, to be heard and was both times refused?

(8) in the light of allegations of racial religious persecution by Jews through misuse of official power, allegations of malice and purposefulness, conspiracy, perjured testimony and suppression of evidence?

(9) when the evidence shows that a charge of insubordination was upheld for not appearing on October 9, 1969, Vietnam Moratorium Day, a day for which the Board of Education ruled that teachers might exert political rights and that attendance was voluntary and on which day 157 people on the professional staff were absent from

Franklin K. Lane High School alone?

(10) where the evidence indicates that she lost her tenured job for insubordination for not appearing for medical examination and for not submitting to said examination on November 6, 1969 when she did appear, and considering the fact that Education Law §2568 was violated in that petitioner was made to report on that day in two hours of the time of notice and was therefore deprived of that part of the law that provided that she could bring to the examination a doctor or any other person of her choice?

(11) where, contrary to Education Law §2568, petitioner was never ordered to any medical examination by any superintendent of schools and not by any deputy?

RELATED QUESTION

(12) Was it inconsistent for the district court in finding violation of due process at the time th at the Board of Edu-

cation withheld the Trial Examiner's report from petitioner, and finding exceedingly casual handlingof the trial transcript, and finding violation of the Board of Education's own by-laws in that the Board of Education members did not read the testimony, to pass over the earlier violation of the by-laws, Section 105 (1) and (3) which sections require that the Board of Education be informed promptly of the suspension of a staff member, together with the nature of the charges but which was not done as indicated by Board Member Mary Meade when she stated in deposition that petitioner was never heard of until receipt of the Trial Transcript many months later and actually after petitioner had been suspended a second time?

QUESTION CONCERNING PETITIONER'S SECOND SUSPENSION WITHOUT PAY AND WITHOUT HEARINGS

(13) Was it error for the district court to fail to look into petitioner's second suspension without pay and without

charges and without any hearings and which suspension actually occurred under the superintendency of Irving Anker after plaintiff wrote to him, with copies to others, sought his intervention, and complained about lack of due process and discrimination because she was WASP and to vacate the notice to depose Irving Anker without reason and dismiss him from the lawsuit for failure to state a cause of action? Was the error continued by the Second Circuit which, without reason, refused to hear the matter on appeal?

QUESTION CONCERNING SEVERANCE FROM THE BRYANT YOUTH AND ADULT CENTER

(14) Was the matter of plaintiff's severance from the Bryant Youth and Adult Center in the summer of 1971, long after her dismissal in 1970 and her suspensions without pay in 1969 and 1970 properly adjudicated, especially in the light of the court having referred to the matter as a "minor mystery"? Did the severance viol-

ate petitioner's constitutional rights and also contradict the facts found concerning her dismissal the prior year? Was it abuse of discretion for the court to vacate, without reason, the notice to depose Abraham Gordon, the Principal of the Youth and Adult Center and were the errors continued by the Court of Appeals which did not consider the matter on appeal?

JURISDICTIONAL QUESTIONS

(15) Are the New York State Division of Human Rights, the New York City Commission on Human Rights, the New York State Supervisory Committee "persons" subject to suit for damages within the meaning of 42 U.S.C. §1983?

(16) Is there federal question jurisdiction over the defendants named in question 15 above under 28 U.S.C. §1331(a)?

(17) Are all of the defendants subject to suit under 42 U.S.C. §1981?

(18) Are the defendants subject to

suit based squarely on the Fourteenth Amendment?

QUESTION CONCERNING CURRENT RELIEF

(19) In the light of the allegations in this lawsuit, Rule 1 of the Federal Rules of Civil Procedure requiring speedy, inexpensive, and just adjudication, in view of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 408 U.S. 388 (1971), the district court's having found violation of due process, and the Second Circuit's having failed to adjudicate on proper facts, and because the lawsuit deals with public and not merely private interest, and in view of the fact that the cases of Lombard v. The Board of Education of the City of New York, 502 F2d 631 (2d Cir. 1974), cert. denied, 95 S.Ct. 1400, and Newman v. The Board of Education of the City of New York, 508 F2d 277 (2d Cir. 1975) cert denied, 95 S.Ct. 1447 are still bogged in the Eastern District of

New York, can the Supreme Court, through bifurcation, expedition of finding of denial of due process on at least one point, by direct order to the Board of Education, or by exercise of other of its broad powers relieve petitioner quickly of the deprivation of her salary over the last seven years?

(20) In the light of the foregoing question, can this court relieve petitioner of the time consuming and expensive burden of duplicating and filing large numbers of copies of ensuing papers through interpretation of the intent of Rule 53 of the Supreme Court Rules, or in other ways, although petitioner does not technically qualify to proceed in forma pauperis?

QUESTIONS CONCERNING DISMISSALS

Where damages are sought under 42 U.S.C. §1981, §1983, §1985, 28 U.S.C. §1331, §1343 and pursuant to the Fourteenth Amendment on charges of conspiracy between the

Board of Education and its staff on one side and state and municipal agencies and their staffs, and petitioner's former attorneys on the other side, to the extent of the latter having cooperated with the former to accomplish loss to plaintiff of her job and livelihood and to silence her, and accompanied by their joint efforts to have her adjudged insane, and where allegations were made that the conspiracy was by Jews, purposeful and malicious, and existed to protect their interests, and to prevent exposure of their harm to petitioner and to Blacks, and where the allegations contained specific dates, persons, purposes and results, and where triable issues of fact were raised in affidavits, and evidence was suppressed, and decision for summary judgment was based on version of facts of defendants and not of petitioner, was it error and/or abuse of discretion for the

district court to grant dismissals, (and, upon appeal, for the circuit court, without opinion, to fail to reach the issue) to the following:

(21) Board of Education Members including Mary Meade and Board of Education staff: Bernard E. Donovan, Nathan Brown, Irving Anker, G. Gary Sousa, Sheldon Wein, Mary Cohen, Morton Selub, Elizabeth O'Daly (Stolper) Jacob Zack, Beverly Lipschitz, Daisy K. Shaw, Murray Cohn, Evelyn Konigsberg, Charles Foy, Sarah Braphart, Naomi Pool, Murry G. Fischer, Sidney Leibowitz, Sidney Rosenberg, Theodore H. Lang, Daniel Gutman?

(22) The Division of Human Rights of the State of New York and its staff: Joseph Sperazi, Walter P. Offut, Jr., Jean MacPherson, Arthur Stern?

(23) The Commission on Human Rights of the City of New York and its staff: John Doe and James Doe, since known as

Henry Sloman and Jacob Witner, and Robert Perez-Wilson?

(24) The New York State Supervisory Committee and its staff: Norman Frankel and Harold G. Israelson?

(25) Employees of the Corporation Counsel of the City of New York: Edith (Judith) Gordon and Charles D. Maurer?

(25) The staff of the District Attorney of Brooklyn: Jane Jones, John Jones, James Jones and Jack Jones (fictitious names) three of which since known as Audrey Vitolo, Richard Gaza and Detective Buda?

(26) The staff of the District Attorney of Manhattan: John Smith (fictitious name) and Michael Alan Richman?

(27) William Goffen, Abraham Mark Levien, David Lubash and Frederick Backer?

QUESTION CONCERNING AWARD AGAINST MARJORIE O'CONNELL

(28) In view of the foregoing allegations of the lawsuit and allegation of having solicited petitioner for a bribe to be paid to work out reinstatement through the New York State Division of Human Rights, and in view of her knowledge of facts, her failure to answer the complaint, her disobedience of subponaes and other court order to appear for deposition, and in view of the complaint having sought monetary punitive and other damages, was the award of $350 plus $100 costs against Marjorie O'Connell inadequate and was it error for the Second Circuit, on appeal, without reason fail to reach the issue?

QUESTIONS CONCERNING EVIDENCE

(29) Concerning the early dismissals granted to the New York State Division of Human Rights and its staff, the New York City Commission of Human Rights and its staff, the New York State Supervisory Committee and its staff, employees of the Board of Education, William Goffen, Abraham Mark Levien and others (all granted in 1972) when triable issues of fact were raised in affi-

davits, and no discovery was allowed, i.e. every notice to depose vacated (except that of lowest supervisor, Mary Cohen) and no interrogatories were answered and a motion to compel answers was denied, were the dismissals granted when evidence was suppressed and was the suppression sufficient to reverse those dismissals, allow discovery and require a new trial? Did the Court of Appeals err in affirming the dismissals?

(30) Concerning the later dismissals (in 1974) granted to the remaining employees of the Board of Education, and others, when triable issues of fact were raised in affidavits, and most evidence continued to be suppressed i.e. every notice to depose a high supervisor vacated (except Mary Meade), production of documents (including the tape recording of petitioner's voice at the Board of Education meeting at which petitioner was dismissed) was denied as a

"fishing expedition", was the suppression sufficient to reverse the dismissals so as to allow discovery and require a new trial?

(31) In view of the above-mentioned stays of discovery and of the court requiring that discovery proceed only on written interrogatories was the suppression sufficient to guarantee that petitioner would not have a chance to prove the conspiracy aspects of the lawsuit?

(32) In view of all of the proceedings of the lawsuit, is there any evidence to support the following:

(a) That petitioner had made general claims of conspiracy among all people of Jewish ancestry;

(b) "Her unspoken reason for not appearing may well have been her knowledge that many of the medical examiners were in her words "descended from Abraham through Isaac"* and that she feared that she would not get an objective evaluation."

*descendant of Abraham through Isaac, was a term used on an occasion by petitioner to more precisely define the group referred to and to define along ethnic rather than solely religious lines and also so as to eliminate Arabs.

(c) That petitioner had made shot-gun charges of conspiracy against Jews and a few non-Jews.

(d) "The thesis of Mrs. Buck's complaint appears to be that individuals who disagree with her interpretation of the facts surrounding her dismissal by the Board of Education thereby join an ongoing conspiracy against her and members of her race."

If not, was the attitude of the court such that it negated the possibility of getting a fair trial and requiring a trial before another judge or preferably by a jury?

(33) Are the following findings of the court contradicted by the evidence?

(a) She was suspended without pay on the recommendation of Dr. Sidney Rosenberg. (Note he recommended second suspension without pay which had nothing to do with the suspension referred to by the court.)

(b) That petitioner's mental status was in controversy concerning ability to perform as guidance counselor. (Note continuing official satisfactory ratings.)

(c) That the court felt the need for medical advice under the special circumstances of the case. (Note no special circumstances).

(d) That petitioner's delays in transcribing depositions contributed to delay in trial. (Note delays of the defendants, not of petitioner, but over $20,000 deducted from backpay award.)

(e) Dr. Jacob Zack was the Assistant Superintendent who ordered the (medical) examination. (Note no such order by him or anyone else).

(f) Plaintiff's ultimate dismissal was preceded by full and fair evidentiary hearings. (Note - see Questions 7-11 above).

(g) that Marjorie O'Connell assisted plaintiff in presenting her case to the New York State Division of Human Rights. (Note New York State Division of Human Rights case closed in 1968 - Marjorie O'Connell retained in 1970.)

(h) That she could have submitted to examination by the Board of Education and found to be in good health. (Note, not possible without sacrificing due process rights).

(i) Plaintiff did not attempt to relate her dental bills to the schedule in the union's plan. (Note documentation of $4,000 in covered dental bills and schedule of union's allowance plan submitted.)

If so, are the errors sufficiently grave to call for revision of findings and/or new trial?

QUESTIONS CONCERNING DAMAGES

(34) In view of the district court's order to vacate petitioner's dismissal with award of backpay and remand to the Board of Education and in view of the fact that the Second Circuit failed to adjudicate on correct facts, since petitioner continues unemployed to the present time, should the order for backpay now be updated to include salary and other benefits to date and also continuing until restored to her position?

(35) In view of the district court's order to vacate petitioner's dismissal with award of backpay and remand to the Board of Education and in view of the fact that the Second Circuit failed to adjudicate on correct facts, should the award be revised to include covered dental expenses as already indicated plusall other fringe benefits that would have accured had she been working, including pension rights,

sickleave, continued reimbursement for Health Insurance Plan premiums, etc.?

(36) In view of the fact that petitioner sought several kinds of damages including backpay and punitive damages and unspecified money damages (the latter requested to be paid by the individual defendants to the City of New York) was it error for the court to deny such, stating that the City did not support such request and then, upon motion to amend the complaint so as to pray that damages be paid to her directly, to also, without opinion, deny the motion?

MISCELLANEOUS QUESTIONS

(37) In view of the allegations of the lawsuit and especially the claim that plaintiff's attorneys had worked in concert with others who worked under color of the statutes, was it plain error for the court to decide that discrimination by an attorney is not state action and therefore not

remedial in a civil rights action, and was the error continued by the Court of Appeals when it refused to consider petitioner's appeal?

(38) Under the circumstances of this lawsuit and in light of all of the allegations was it error for the district court to find any of the defendants, including Daniel Gutman, immune from suit?

(39) Considering all of the allegations and circumstances of this lawsuit was it abuse of discretion for the district court to chose not to treat libel and slander as pendant issues?

(40) If it can be shown that the district court was not totally fair; that the Court of Appeals refused without cause to consider any of petitioner's appeals and reversed the award to her on incorrect facts, and then, when petitioned to rehear with proof of correct facts ..... with out reason denied the petition, and in the light of

petitioner's career and livelihood and professional reputation depending upon those courts, and considering that evidence is suppressed touching on serious matters of public interest and of criminal nature, is there sufficient reason for the case to be transferred to a circuit other than the second circuit or in another way handled by judges other than those located in New York City?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

Title 28, United States Code, §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, §1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by anyperson:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section

1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote.

Title 42, United States Code, §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for

the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Title 42, United States Code, §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviliges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, §1985

(3) If two or more persons in any State or Territory conspire or go into disguise on the highway or on the premises of another for the purpose of depriving,

either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or terriroty from giving or securing to all persons within such State or terriroty the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person, as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in fur-

therance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code, §1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section (42 U.S.C. 1985) or about to be committed and having power to prevent or aid in preventing the commission of same, neglects or refuses so to do, if such wrongful act be committed shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be re-

covered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect the legal representatives of the deceased shall have such action therefore and may recover not exceeding $5,000 damages therein for the benefit of the widow of the deceased if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

AMENDMENT ONE
OF THE CONSTITUTION OF THE
UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT FOURTEEN
OF THE CONSTITUTION OF THE
UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure

Rule 26 (a) Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

New York State Education Law §2573

7. Notwithstanding any other provisions of this chapter a city having a population of one million or more hearings prescribed hereunder shall be held as follows:

The Board of Education on receiving notice of such charges shall proceed to try and determine the case either in the Board of Education, or by a committee of its body consisting of one or more members, or by a Trial Examiner appointed pursuant to Subdivision 21 of Section 2504 of this chapter, and shall fix the penalty or pun-

ishment, if any, to be imposed for the offense, and such penalty or punishment shall consist of a reprimand, fine, suspension for a fixed time without pay, or dismissal; provided, however, that a vote of a majority of all the members of the Board of Education, be necessary to impose a penalty or punishment; and provided, that in no case shall any teacher or other non-supervisory employee subjected to tenure provisions of this section be suspended more than ninety days pending hearing and determination of the charges, and the imposition of penalty or punishment. The report of any such committee or Trial Examiner holding such trial shall be subject to final action by the Board of Education, each member of which shall, before voting review the testimony and acquaint himself with the evidence in the case. The Board of Education shall review, confirm, or modify the conclusions of the committee or Trial Exam-

iner, and the decision of the Board shall be final, except as they may be reviewed under the provisions of this chapter. In case the principal or other officer or teacher is acquitted, he shall be restored to his position with full pay for the period of suspension. At all trials and investigations authorized by this chapter all testimony taken shall be under oath, which the president of the Board of Education, chairman of the Committee or Trial Examiner conducting the trial or investigation is hereby authorized to administer. For the purpose of any investigation or hearing, the Board of Education by its president, the chairman of a committee of its body or a Trial Examiner shall have power to subpoena witnesses, papers and records. The Supreme Court shall have power, upon the application of such President, Chairman or Trial Examiner to compel any witness who may be summoned to appear and testify before

said Board of Education, committee or Trial Examiner.

New York State Education Law §2568

The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by its board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his choice.

By-Laws of the Board of Education of the City of New York, Section 105.

1. No member of the teaching and supervisory staff, including examiners, of the administrative staff or of the Attendance Staff who has served the full and probationary period prescribed by, or in accordance with law, shall be removed, except for cause after a hearing, by the affirmative vote of a majority of all the members of the Board of Education. Any such member may be suspended by the superintendent of schools who shall report his action at the next regular meeting of the Board of Education, when the facts relating to the case shall be submitted to the Board for its consideration and action.

2. Charges may be preferred against any member included in the preceding subdivision for:

(a) unauthorized absence from duty or excessive lateness.

(b) neglect of duty;

(c) conduct unbecoming his position or conduct prejudicial to the good order, efficiency or discipline of the service;

(d) incompetent or inefficient service;

(e) failure to comply with the provisions of subdivision 40 of section 90 relative to contracting of debts;

(f) violation of the by-laws, rules or regulations of the Board of Education; or

(g) any substantial cause that renders the member unfit properly to perform his obligations to the service.

3. The member against whom charges are preferred shall, in person or by counsel, be entitled before the trial to receive on due demand, a copy of the charges and specifications and shall be entitled to participate in person or by counsel, or both, in the trial of the charges, to cross examine

opposing witnesses and to call and examine witnesses on his own behalf.

The superintendent of schools, upon suspending any member, and in advance of filing the charges and specifications, inform the accused and the Board of Education of the character of the charges to be met. Such information shall not prevent the including in the trial of additional charges and specifications provided the accused is informed thereof.

7. The Board of Education, on receiving notice of charges against the employee, shall proceed to try and determine the case, either in the Board of Education or by a committee of its body consisting of one or more members; or by the assignment of one or more of its employees as trial examiner. The report of any such trial committee or trial examiner shall be subject to final action by the Board of Education, each member of which shall, before voting, read the

testimony and evidence in the case. A vote of the majority of all members of the Board shall be necessary for a finding of guilt or to impose a penalty or punishment.

Rule 1 of the Federal Rules of Civil Procedure

These reules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

STATEMENT OF THE CASE

On July 23, 1971 petitioner, Ruth E. Buck, filed complaint in the U.S. District Court, Eastern District of New York, pro se, against the Board of Education of the City of New York, the New York State Division of Human Rights, the New York State Supervisory Committee, the New York City Commission on Human Rights, their named employees individually, and others (see caption on cover) alleging civil rights violations and denial of due process and equal protection of the laws because of purposeful and malicious individual acts and conspiracy to have her wrongly adjudged insane and causing her loss of tenured employment as Guidance Counselor in the New York City public high schools and other harm for three reasons:

(1) because she would not join in or cooperate with the illegal and racially motivated strikes called by the predominantly Jewish United Federation of Teachers and Council of Supervisory Associations;

(2) because she exercised constitutionally guaranteed right of free speech, expression and association and criticized supervisors, and grieved through channels because of their cruel, harsh and unequal treatment of Black students in her caseload, and because she filed complaints with city and state agencies, and district attorneys, and instituted court action against Superintendent Bernard E. Donovan and Assistant Superintendent Elizabeth O'Daly during the 1968 strike. Ruth E. Buck v. Bernard E. Donovan and Elizabeth O'Daly, Supreme Court of the State of New York, County of Kings, #14195, September 1968.

(3) because she is White Protestant of Anglo-Saxon origin, which group was singled out in 1965, and later, by school officials on school time and premises and condemned as WASPS.

Jurisdiction

Jurisdiction was invoked under 42 U.S.C. 1983, 1985, 1986 enabled by 28 U.S.C. 1343 and invoking also the First and Fourteenth Amendments to the United States Constitution. The district court also found jurisdiction under 28 U.S.C. 1331(a) and on appeal petitioner added 42 U.S.C. 1981 asserting that claims fell clearly within that statute. McDonald v. Sante Fe Trail Transp. Co.,

427 U.S. 273 (1976)

Facts

The facts leading up to this lawsuit are complex and now complicated because evidence was suppressed, court opinions contain prejudicial matter, significant omissions, and are in other ways erroneous. No appeal was allowed to petitioner in the Second Circuit. The district court wrote that petitioner had made "shot-gun" charges of conspiracy against Jews and a few non-Jews which was followed by deduction of over $20,000.00 from the backpay award. Some factual detail is therefore given below concerning each defendant and approximately in order of appearance in the caption. For the sake of brevity this section is written in the first person and is necessarily abbreviated.

Five members comprised the Board of Education in 1970 when I was dismissed: Murray Bergtraum, was president and he of-

fered me a disability pension in exchange for agreement not to litigate although I was healthy, had no record of illness, had seen no doctor, and my attendance record was excellent.

Mary Meade was assigned to my case. She did not read the testimony and thought that I had a history of unsatisfactory ratings; she "briefed" the other members on the case, urged them to vote to dismiss me. She herself voted to dismiss me. In deposition it became clear that she knew little about the case and nothing about it having concerned medical examination.

Isaiah Robinson and Seymour Lachman joined in the vote to dismiss me. Joseph Monserrat corresponded with Congresswoman Shirley Chisholm about my status and thereafter did not join in the vote to oust me.

At the public meeting on July 22, 1970 all of the board members and superintendent, Irving Anker were present. I ad-

dressed each by name and told them that I had done nothing wrong, was guilty of no charge but that I did not know how to argue because I had not seen a copy of the Trial Examiner's Report. I asked them why I was there without a copy and asked for a copy but that was refused. My attorney, David Lubash, did not attend the meeting and told me not to go and because of his mal-advice I was some minutes late. Mary Meade, in deposition, said that the decision to dismiss was made before the public meeting, in private session, and that the public meeting was merely for the formal voting. (The Second Circuit Court of Appeals decided that I was not present and reversed the district court's award). My argument before the Board of Education was taped by them.

Bernard E. Donovan was Superintendent of Schools in June 1968 when Principal Morton Selub referred me to Board of Education

doctors. According to New York State Education Law §2568 the Superintendent (albeit unconstitutionally) is the one empowered to order medical examination. I was never ordered by anyone to report for medical examination - not by the superintendent and not by his deputy. Dr. Donovan knew me for two other reasons: (1) because grievance that was started at low levels ultimately reached him; (2) because, in September 1968, during the three month illegal teacher strike, after other teachers had reported to work with me and students were reporting for classes, I sought the help of District Superintendent, Elizabeth O'Daly to get supplies and into locked rooms, etc. and was ignored by her while she was holding meetings with the striking principals. I wired Dr. Donovan for help and was again ignored. Thereafter I brought an Article 78 proceeding against Dr. Donovan and Mrs. O'Daly seeking to force them

to respond. Contrary to public policy the application was opposed by Assistant Corporation Counsel, Charles Maurer, and dismissed by Supreme Court Justice Bertrum Wegman. (Charles Maurer is believed to have later gone to work for the U.F.T.) The 1968 strike was racially oriented, against Blaci school administrators in Brooklyn, and was called by the largely Jewish United Federation of Teachers which was opposed to decentralization of the New York City School System.

Dr. Nathan Brown was the Superintendent of Schools in 1969 after I had grieved through channels up to Dr. Donovan, and at the time that I grieved anew to newly appointed Superintendent of High Schools, Dr. Jacob Zach. By letter dated November 29, 1969 which I publicized to high school principals I was sharply critical of cruel and unfair treatment to fourteen Black and Puerto Rican students in my caseload. Superintendent Nathan Brown suspended me with-

out pay and around mid-day of December 8th, 1969. While working at Lane, I was told to go home and a letter would follow. I have never worked at Lane High School since.

Irving Anker was the Superintendent of Schools at the time of my second suspension without charges and without hearings. By letter of Assistant Superintendent, Dr. Sidney Rosenberg, I was threatened with another suspension whereupon I wrote Superintendent Irving Anker, complained to him of lack of due process, and I sought his intervention. He did not reply and right after that I found myself severed from the payroll for the second time.

G. Gary Sousa was the Law Secretary of the Board of Education who brought the charges againstme at the hearing before Trial Examiner Daniel Gutman. Because I had all satisfactory ratings, had never been ordered to medical examination, and no valid appointment had ever been set, there was no substance to the case brought against me.

Secretary Sarah Braphart and Medical Receptionist Charles Foy were called to testify against me and they lied under oath. The proceedings were marked by flaring temper of Mr. Sousa. My own attorney, David Lubash, double crossed me when the hearings were in the last session. Although he had agreed to do so, he did not present any matter concerning controversy over strike or grievances. I sought twice to speak and each time was silenced.

Sheldon Wein was a teacher at Lane High School with a license lower than mine, but favored by the Principal as evidenced by his assignment as Assistant Dean. At the request of Principal Morton Selub , Mr. Wein wrote a letter in May 1968 which told about a four minute tantrum that he supposedly witnessed over the telephone, but which had not occurred. The letter was never made known to me until it was found attached to the report of Mr. Selub to Dr. Donovan requesting my

medical (psychiatric) examination. There was never any opportunity to confront Mr. Wein face to face. At a point in the lawsuit he was noticed for deposition, which was vacated, and then allowed, but due to the death of my mother-in-law had to be cancelled. The court would never again allow his deposition, just as it disallowed discovery with almost all of the other defendants.

Assistant Principal Mary Cohen was my immediate supervisor and there was repeated head-on collision with her on ideological matters. She struck with teachers in 1967 when I worked; she struck again in 1968 while I worked; she used school time to advise me that she supported the strike; she supported the suspension of 600 Black students from Franklin K. Lane High School, en masse, and without hearings (See Knight, et al v. Board of Education, et al. , 48 FRD 108), 300 of whom were in my caseload; she supported an advertising campaign to keep

Blacks out of Lane High School and upon my refusal to contribute money, she asked another guidance counselor, Julius Zeidman, to inquire further of me.

Following the 1967 strike, UFT Chapter Chairman Harold Saltzman (in cooperation with Mary Cohen) harassed me by writing a letter to Mrs. Cohen stating that I had told certain students that they did not have to attend teacher, Miss Allen's classes, and criticizing my "unprofessional" attitude. When it was found that the students belonged in another guidance counselor's load and that I had never seen the students, they became angry. I asked Principal Morton Selub to have the Saltzman letter answered which he did not want to do. Finally, on my reminder, he requested Mary Cohen to answer which she did and followed the next day with an unfounded derogatory letter to me criticizing my work in five areas.

That was the beginning of a long ser-

ies of grievances and letters. Grievances were settled in my favor and it was agreed that the critical letter of Mrs. Cohen would be removed from the files. But no decision was made in writing and the letter showed up again when referred to by the Principal in a report to the Superintendent seeking my medical examination.

I was continually harassed by Mrs. Cohen and Mr. Selub and they continually wrote critical letters as frequently as three times a week. All of the letters were answered and satisfactorily rebutted but inroads were being made in my time which should have been better used to care for students. The subject matter of the letters and grievances varied from the suspension of students without reason to attempt to convince me to put unqualified students on free lunch, haphazardly replace bus passes, refer students to unlicensed agencies, etc. I finally made complaint to District Superintendent Eliza-

beth O'Daly and with documentation concerning the "absurd" supervision but she threatened me by asking if I knew how many levels of supervision there were between me and her and asking whether I would like a transfer.

Meanwhile the Principal called on District Guidance Supervisor, Dr. Beverly Lipschitz to help by visiting me often and harassing me and adding to the derogatory letters which were to be used in the plan to oust me but which were also rebutted. The letters of Mrs. Cohen were particularly lacking and her weakness as a supervisor became clear. It was obvious that unsatisfactory rating could never be sustained in due process hearings and at the end of June 1968 Mr. Selub referred me for psychiatric examination to avoid all due process. As shown by the cases of Lombard and Newman the medical examination procedure is set up to oust tenured staff without any hearings.

Mary Cohen and Morton Selub were both

serving probationary periods at the time and Elizabeth O'Daly had been newly assigned to District #19 the same year.

District Superintendent, Elizabeth O'Daly, was also reponsible in 1963 for keeping me away from Lane during some days of the strike because she sent me home or to another school. After she and Dr. Donovan ignored my pleas for help during the strike I also appealed to Educationer Commissioner James E. Allen and that was followed by an official letter from Mrs. O'Daly criticizing my having passed over her office and explaining that she was there to handle such matters. That letter was also answered and rebutted. Black, former chairman of the Ocean-Hill Brownsville Governing Board in Brooklyn, Rev. C. Herbert Oliver also brought grievance to Dr. Allen on my behalf.

Dr. Jacob Zack came into a line of supervision over me for about three months

in 1969 when he became Assistant Superintendent in charge of High Schools. Right after I wrote him the above-mentioned November 29, 1969 letter critical of the unfair treatment to fourteen Black and Puerto Rican students in my load, Deputy Superintendent Theodore Lang wrote to Superintendent Dr. Nathan Brown that Assistant Superintendent Jacob Zack, urged my suspension. Dr. Lang's letter gave much erroneous detail, stating that I had been given unsatisfactory rating which I unsuccessfully contested and which had actually never occurred. I immediately wrote to Dr. Brown to correct those matters but he never answered me and I remained suspended.

Dr. Beverly Lipschitz was the guidance supervisor in District #19. She was anti-Protestant and used time at official meetings to mock Billy Graham. She urged guidance counselors not to sign certain materials because otherwise later they would not be able to change the story. She was a

staunch supporter of the strikes and held meetings with striking guidance counselors outside of school and she taught guidance counselors that they had to go along.

For the sole purpose of harassing me and in order to cooperate with and help Mary Cohen and Morton Selub, Dr. Lipschitz wrote unfounded letters of criticism about my work and she visited me often to harass me. Her letters were also rebutted but referred to by Mr. Selub in seeking order for my psychiatric examination.

They also purposed to make me nervous and force my resignation as letters were coming to me from Mary Cohen, Morton Selub, Elizabeth O'Daly and Beverly Lipschitz simultaneously and that was coupled by their frequent visits and telephone calls from Mary Cohen who sought instant answers to questions concerning my heavy load of students. My own attorney, William Goffen cooperated with them against me by failing to press a lawsuit pending in the Supreme

Court in Manhattan. Temporary injunctive relief from that court had been obtained concerning medical examination in early September 1968 and action was not taken again until the following April or May.

Daisy Shaw was the head of the Bureau of Educational and Vocational Guidance and she arranged a meeting in 1965 and applauded a speech in which White Anglo-Saxon Protestants were condemned as WASPS and described as those who had done so much damage to our country that new people had taken over and the day of the WASP was over. Her office was responsible for wrongly leaving me off the list of eligible guidance counselors the previous year. Upon my complaint she condemned me and called my then Principal, Murray Cohn, at the High School of Commerce, falsely telling him that I had made such a rumpus at the Board of Education that I had made one of her employees sick. Mr. Cohn took sides with her and called me

into his office to inquire as to what happened. My relationship with him, which had been excellent, was never the same and he indicated that Mrs.Shaw had sounded very convincing.

Three years later, in 1967, Mrs. Shaw was responsible for illegally transferring me, over the objection of my principal, Donald Ryan, from William Cullen Bryant High School to Franklin K. Lane High School.

Evelyn Konigsberg was the Principal of Washington Irving High School when I sought appointment as licensed Guidance Counselor, after having passed competitive examinations. She, in keeping with the policy of denying White Protestants, and in keeping with my being "blacklisted" by Daisy Shaw refused me consideration for an open job as guidance counselor at her school.

Murray Cohn, as indicated, was Principal of the High School of Commerce at the time that I worked there as teacher and with

good and excellent ratings from him. When I passed the examinations for guidance counselor he offered me consideration for a position at his school, but after the incident with Daisy Shaw he changed his mind.

Charles Foy was the receptionist at the medical department when I reported there on November 6, 1969 and he was produced as a witness against me at the administrative hearings. I saw him only once and all of my conversation was taped on a recorder that I brought with me to the medical division. His testimony under oath varied from what actually was said.

Sarah Braphart was the secretary to the Medical Director, Dr. Sidney Leibowitz, and I had never seen her until she was produced at the hearings as a witness against me. She lied under oath and testified to a five-minute conversation that she said took place between me and her in November 1969 but which had not taken place.

Dr. Naomi Pool was the Assistant Medical Director and she was also produced as a witness against me. Likewise, I had never before seen her, but she testified about my "intransigent" attitude. Actually, in November 1969, when I was at the medical division I asked to see a supervisor about the fact that I had been denied due process because I was not given a chance to bring someone with me to the examination as allowed by law. She testified that she did not come out of her office to see me because I had a file "3/4 of an inch thick".

Dr. Murry G. Fisher, was the former Assistant Medical Director who wrote to me on several occasions bidding me to the examination. Dr. Sidney Leibowitz was the Medical Director at the time and I also corresponded with him. While evidence is suppressed in the instant case, evidence from deposition is oozing from the case of Newman v. The Board of Education, 503 F 2d 277

(2d Cir. 1975), cert denied, 95 S.Ct. 1447. The doctors are very much involved in carrying out procedure by finding of "unfit" in order to oust dissenting staff without hearings.

As shown above, Dr. Sidney Rosenberg and Dr. Theodore Lang both wrote letters to accomplish my ouster. Dr. Nathan Brown acted on those letters and suspended me without pay. Dr. Sidney Rosenberg, in a letter in March 1970 threatened a second suspension which was implemented under the superintendency of Dr. Irving Anker who refused even to answer my letter of complaint.

Daniel Gutman was the Trial Examiner who is particularly vulnerable to suit rather than being immune. He used his high position maliciously to silence and condemn me, call my good attitude "defiant" and he maligned my character in such a way as to prevent me from again gaining employment. He recommended that I be permanently discharged

for insubordination although there was not a shread of evidence to support such finding.

The Division of Human Rights of the State of New York was set up and is required by law to receive and handle complaints of racial-religious and other discrimination. In June 1968, before I had any knowledge of any demand for psychiatric examination I brought to that division a complaint against Principal Morton Selub, Assistant Principal, Mary Cohen, Director of Educational and Vocational Guidance, Daisy Shaw, and Guidance Supervisor, Beverly Lipschitz, giving details and documentation of serious harassment to me, illegal transfer, official condemnation of White Protestants and later, names of people willing to testify, and who, incidentally were later transferred from their positions in the Board of Education.

I saw Field Representative Joseph

Sperazi who told me to go home and think over the matter of whether I really wanted to make a complaint and return if interested in pursuing the matter further. The next day, when I returned with documentary material I was detained the whole morning waiting around and was finally asked to sign an unprofessionally appearing typewritten complaint composed by them.

Morton Selub immediately retaliated by sending me for psychiatric examination by Board of Education doctors. I called Mr. Sperazi immediately about the retaliation and he told me to come right into his office with the report. Upon my arrival there, he told me that the Division's legal staff had advised that they could be of no help and I left the office.

Walter P. Offut, Jr. was a black Senior Field Representative who was assigned to investigate my case. Time was of the essence because the Board of Education was repeat-

edly sending for me for examination and I sought the intervention of that division. Hearing was held in mid-July before Jean MacPherson; I asked that minutes be taken but that was denied except for notes taken by one of the staff and later written up and distorted. That material was submitted in the instant lawsuit as documentary evidence and to gain dismissal. My case was crystal clear but Miss Mac Pherson could not find in my favor. She advised me by telephone that the weight of opinion inside of the Division was at one point going in my favor and at another against me. She indicated she thought that even if there were anti-Protestant remarks they would not recur. Arthur Stern was supervisor and Area Director at the time. After many weeks, Rev. Offut advised me that I could not find justice in that Division; he inquired as to whether I could get an agency to support me; and he told me that

the Board of Education was just too powerful for me alone. I withdrew my complaint after that advice.

The Commission of Human Rights of the City of New York was also set up and required by law to receive complaints such as mine. Upon calling in advance I was told by professional staff that that agency would be interested in my complaint. Upon arrival I saw Jacob Wittner, Henry Sloman and probably Robert Perez-Wilson, all professional staff. They were disinterested, shifted me from one person to another, and although I was there early they kept me there for hours. At intervals I inquired about the progress of my complaint but was never given any information or satisfaction. Mr. Perez-Wilson, months after the case was filed, told me that the Board of Education would not respond to their inquiries and that they had no way of making them answer. I obtained absolutely no relief and was never advised until the

instant lawsuit that the matter was dismissed.

The New York State Supervisory Committee was set up to investigate and recommend action in cases of harassment of teachers following the teacher strikes. I properly registered complaint with details of harassment and including rearranging of caseloads to add 20 additional classes to my already heavy load. Norman Frankel, investigator for that committee interviewed me and indicated satisfaction on finding a complaint so well documented. But after he interviewed Morton Selub and Mary Cohen and other guidance counselors, he resorted to questioning me as to whether I thought that Mary Cohen was Jewish. He wrote up reports which I did not see until submitted in the instant lawsuit and he distorted material facts particularly concerning size of caseload, calling my figures as taken from an unidentified record clerk and Mrs. Cohen's

as official, whereas, in fact, my figures were official and hers were estimates. That material was used to gain dismissal from the lawsuit. Harold G. Israelson was the head of the Supervisory Committee who wrote me that there was no action to be taken. Apparently the New York State Supervisory Committee was used in practise to protect formerly striking teachers from Blacks parents, and was not used to protect a white non-strikers from harassment from Jewish strikers.

Edith (Judith) Gordon was an Assistant Corporation Counsel opposing injunctive relief in the Supreme Court in Manhattan. She advised my then attorney, William Goffen that if the medical examination did not work, my principal would the next year rate me unsatisfactory. Principal Morton Selub, did attempt to so rate me the next year but that was snagged by procedural matters. Charles Maurer was the Assistant Corporation Counsel who, contrary to public policy, opposed my

application to compel school authorities to respond to me at Franklin K. Lane High School during the 1968 strike.

Jane Jones, Audrey Vitolo, John Jones, Richard Gaza, James Jones, Detective Buda, and Jack Jones, the true name of the latter unknown, were professional staff of the district attorney in Brooklyn. Likewise, Michael Alan Richman and John Smith, the true name of the latter remaining unknown, were professional staff of the district attorney of Manhattan.

On five occasions I made personal visits to those attorneys complaining about various abuses including sale of permanent records to students at Lane for $50 and to be substituted into the permanent record system of the school, so that a student with a poor record could buy a good record. All of the complaints were rebuffed by the staff of the district attorneys.

Abraham Mark Levien was the first at-

torney that I engaged and I saw him on one occasion. He agreed to bring an action to nullify the Superintendent's requirement that I submit to medical examination. He introduced me to attorney William Goffen and told me that they would both work on the case. Later I learned that Mr. Levien went to Florida and I never saw him again.

My subsequent dealings were thereafter solely with Mr. Goffen . Upon finding himself sued in the instant action, Mr. Levien maligned me to the court by calling me "hysterical" tending to be "violent", suffering typical "persecution complex", etc. and he was dismissed from the lawsuit without trial and together with explanation that he was an experienced civil service lawyer who should not be required to answer the allegations of the complaint.

On the first visit with Mr. Levien and Mr. Goffen, when the retainer was signed, Mr. Levien distorted facts and solicited my

statement that I had been ordered for medical examination by the Superintendent of Schools which had never been the case. Mr. Levien and Mr. Goffen also advised that there should not and would not be any reference to discrimination based on being WASP.

William Goffen took over the lawsuit and later sided with my principal in the strikes. He called me at home to tell me not to go near the schools in the strike, but I neither asked him for that advice nor did I heed it. The fact of my confronting Principal, Morton Selub, daily while he stood at the entrance gate stating that he closed the school down, followed by my entering the school in the strike had nothing to do with the legal matter before Mr. Goffen. He cooperated with my adversaries more fully when he did not pursue for many months the Supreme Court matter instituted in early September 1968 and while I was being harassed daily on the job. He finally called me and

asked me to rush material back to him by signing it and putting it in the mail at once. Upon pausing to read it I found it contained in the many pages three prejudicial matters, that if I had signed them, would have given opportunity to anyone to question my sanity. Of course I did not sign the papers .

Mr. Goffen also fixed the case to come before "intelligent" Judge Frederick Backer and he expressed his pleasure with that judge because, as in his words, we should be considered with the intelligence of the judge. At the hearing before Judge Backer I sought to speak and was threatened by the judge for even trying to ask a question, although the matter of determination of my sanity was at stake.

David Lubash was my attorney that I engaged to handle the administrative hearings at the Board of Education. He told me of his broad experience along this line and

he agreed to present material concerning the controversy during the strikes and following, grievances, etc. to counter the charges against me. When the hearings took place, however, he double crossed me and let them close with no mention of any such matter. He gave me no advice about when my suspension period would be over, he allowed more than ninety days to go by (the legal limit) without resolution. He advised me not to go to the Board of Education public meeting when they would consider the matter of the charges against me and he did not go himself, telling me that the matter was not important. At the last minute I decided to go anyway which caused me to be some minutes tardy.

Marjorie O'Connell was engaged subsequently to bring action and she let the statutes of limitations for bringing Article 78 relief to toll while I was pregnant with my third child. She advised me

repeatedly to be absolutely quiet about the case and not to discuss it with anyone while she tried to work things out on the "inside". I knew little about legal matters at the time and depended upon her advice. I had no idea that while she was retained I would have to be concerned about tolling of the statutes. She solicited a bribe from me to have reinstatement worked out through the New York State Division of Human Rights which I refused to give. She never answered the complaint and never obeyed court orders to appear for deposition.

The complaint and affidavits filed in this action, of course, give much more detail and allege more fully malice and purposefulness. The vulnerability of the defendants to suit under 42 USC 1986 is evident but was not acknowledged by the district court, althouth jurisdiction, of course, exists under other statutes.

THE LITIGATION

The complaint, filed on July 23, 1971 named numerous defendants for their individual acts and acts in concert to deprive petitioner from around 1965 through 1970 including but not limited to the effort to have her sent to unconstitutional psychiatric examination (Lombard v. Board of Education, supra, Newman v. Board of Education, supra) with its attendant stigma (Steward v. Pearce, 484 F2d 1031 [9th Cir. 1973]) and ousting her without due process as found by the district court; and harassed her in many ways including illegal transfers Courtright v Resor, et al., 325 F Supp 797 (E.D.N.Y. 1971) and because she exerted right to criticize (Cox v Louisiana, 379 US 559, [1964]). Jurisdiction was invoked on several grounds but 42 USC 1986 was largely ignored by the Court although it was particularly applicable to the defendants other than staff of the Board of Education.

At a point in the lawsuit petitioner sought to identify the defendants precisely and in line with her having been identified in the precise terms of White, Anglo-Saxon and Protestant, and she therefore referred to the Jewish defendants as descended from Abraham through Isaac to identify on ethnic and not merely religious grounds, and in such a way as to include those who were ethnically Jews but not necessarily of the Jewish faith, and also to exclude Arabs.

Right after making said identification the defendants moved for psychiatric examination of petitioner and the court, without any showing of need, and contrary to Schlagenhauf v. Holder, 379 US 104 exceeded its authority and, over petitioner's objection, ordered her, upon penalty of dismissal of the lawsuit, to psychiatric examination by a Dr. Harley C. Shands who was chosen specifically on the basis of his race and creed, and which ground for selection was not made

known to petitioner until much later, giving her absolutely no voice concerning any such ground for selection. Thus the court was wrongly persuaded to issue an order to undergo psychiatric examination, ostensibly to determine ability to understand and handle the litigation, and ability to perform as guidance counselor, but actually because of petitioner's exercise of her right to identify the defendants. Order for psychiatric examination many not be issued in retaliation for exercise of a constitutionally protected right. (Leonard v. Sugarman, 466 F 2d 1366 [2d Cir, 1972]).

The constitutionally defective order for psychiatric examination came about as a result of the persuasion of the Chief Judge of the Eastern District of New York, Judge Jacob Mishler, who made a joint decision with the district court judge, the late Orrin G. Judd. But Judge Mishler later proved that he was totally unqualified to

handle any legal matter of petitioner because petitioner brought a later lawsuit involving an insurance dispute based upon diversity of citizenship, Buck v. Allstate Insurance Company, #76C-115, U.S. District Court (E.D.N.Y. 1976) which was assigned to Judge Mishler. He became obviously irate because petitioner appeared for a hearing of a motion, not once but twice, without an attorney, and particularly vexed because he had not detected her as a non-lawyer in the first hearing. That led to abominable words from the bench including: (1) that the last person who appeared before him pro se also thought that he was smart and he sent him away for twenty years; and (2) that if petitioner were not married the lawyers, i.e. lawyers of the firm of Rivkin, Leff and Sherman, would not go within 100 miles of her because "women look defenseless but inside they have the fangs of a wolf", the remarks a matter of record and certified by

the reporter. The inference is clear: constitutional protection in the Eastern District is not guaranteed.

At a later point in the lawsuit petitioner moved to disqualify Dr. Harley Shands which was denied and she therefore sought a series of psychiatric examinations on her own by eminently qualified Christian psychiatrist, Dr. Edgar D. Congdon, a doctor who supported his examinations by early psychological testing to rule out schizophrenia. Reports of Dr. Congdon followed giving petitioner a clean bill of health and thereafter the district court no longer treated as issue the matter of petitioner's sanity following which it denied a motion of the defendants to require continued psychiatric examinations by Dr. Shands or other. However, unfavorable report condemning petitioner as paranoid was served on the defendant Board of Education and it remains in its files, the very agency to whom the

judge referred petitioner for further hearings concerning her job and livelihood.

Thus it is obvious that great care, especially on appeal, was required in this lawsuit but, on appeal, as will be seen, there was total breakdown in the judicial process except for that part of the proceeding concerning the opinion of the dissenting judge.

Suppression of evidence in the lawsuit in the district court was almost total. Early in the litigation, in December 1971, petitioner served interrogatories and followed them by others. Upon lapse of time and letter of reminder to no avail, petitioner moved to compel answers which was denied. About 1 1/2 years later the mater of unanswered interrogatories was raised in open court and finally answers or objections were ordered within thirty days. Even with telephone call reminders they still remained unanswered and petitioner moved again to compel answers and find the attorney in con-

tempt. Interrogatories were finally answered, with many objections sustained, after a lapse of two full years from the time of the December 1971 service.

The motion to find contempt was denied and, in effect, petitioner was punished, again, not by any showing of real reason, but a court ruling followed that she was to proceed only on written interrogatories, and not by deposition, thus practically guaranteeing that she would not have the benefit of spontaneous answers, and certainly would be unable to prove conspiracy allegations in this already difficult lawsuit.

Meanwhile, earlier in the lawsuit, in February 1972, petitioner noticed various defendants for deposition and quickly followed those notices by notices to depose others. Every notice to depose was, without cause, vacated, except for the lowest supervisor, Mary Cohen, and then because the

deposition was "agreed to" by the Corporation Counsel.

In 1972 dismissals were granted to more than half of the defendants although triable issues of fact had been raised in affidavits, while First Amendment claims were untreated by the court, while all notices to depose (except Mary Cohen) were vacated, all interrogatories were unanswered and evidence was suppressed. At the same time petitioner's claims for libel and slander were simply dropped from the lawsuit although such claim as pendant issue was entirely proper.

Here and there a deposition was allowed but only in the most arbitrary and capricious manner. Late in the lawsuit the court, without notice, changed its position of allowing only written interrogatories and permitted a deposition of Principal Morton Selub which was met by anger, strenuous objection, and

correspondence to the court by attorneys for the Board of Education. A deposition of Board of Education Member Mary Meade was also allowed and the lawsuit partially won largely because of that deposition. But that was also arbitrary because depositions of all other Board Members continued without reason to be stayed, including the deposition of Joseph Monserrat who had corresponded with Congresswoman Shirley Chisholm about petitioner's severance from the Board of Education. On the basis of Wood v. Strickland, ___US___, (No. 73-1285, Feb. 25 1975) damages against Mary Meade should have been allowed.

Late in the lawsuit by memorandum dated January 7, 1974 it would appear that finally discovery was going to be permitted but that was also a mere formality. Petitioner quickly reacted to the memorandum, noticed defendants for deposition, sent interrogatories, and moved for production of documents but that was to no avail. The court

vacated notice to depose defendant, Dr. Naomi Poole, denied others and referred all remaining discovery matters to Magistrate Max Schiffman including the vital matter of production of the tape recording of petitioner's argument to the Board of Education at the meeting on July 22, 1970 when the Board of Education members voted to dismiss her. It was concerning that point that the Court of Appeals reversed the award stating that because she was absent from that meeting she had caused herown dismissal.

It was in March 1974 that a hearing was held behind closed doors concerning petitioner's various discovery matters. Three people were present: Magistrate Schiffman, Assistant Corporation Counsel, Paula Omansky and petitioner. Petitioner asked that minutes be taken and that was denied. The magistrate informed petitioner that now that he was taking over the lawsuit there would

be no nonsense. He told petitioner not to speak unless spoken to, to number her papers and keep quiet. Thereafter he and Miss Omansky carried on conversation about various matters including where she should get a job after leaving the Corporation Counsel and the unappealability of the denial to the Board of Education of its motion for summary judgment, and at length they mocked petitioner's mental state. A few days later, after much thought, petitioner moved to disqualify Magistrate Schiffman. That motion was denied with comment from the bench that "not every Jew is corrupt". Needless to say, all of the discovery sought by petitioner was denied by Magistrate Schiffman and request for the tape recording of her voice at the Board of Education meeting of July 22, 1970 was denied as a "blatant fishing expedition".

Petitioner brought a mandamus proceeding to the Court of Appeals because the case was about to go to trial with suppres-

sed evidence. That too was without opinion denied.

Trial was held in the spring of 1975 for several hours on each of several days. Judgment followed which vacated petitioner's dismissal from her job, awarded back pay with interest and other relief upon the court's finding that petitioner had been denied due process of law when the Board of Education voted to dismiss her at the public meeting on July 22, 1970 while withholding the Trial Examiner's Report from her.

On appeal there was total breakdown of the judicial process because the second circuit in a two-to-one decision reversed the district court's award finding that petitioner was absent from the Board of Education meeting on July 22, 1970 and therefore caused her own dismissal. Petition to rehear with offer of proof of correct facts was denied, again two-to-one, and without opinion. Petitioner had appealed on various points but the Court of Appeals refused, without opinion, to consider even one issue that petitioner had raised.

The Second Circuit has amply demonstrated that petitioner, a White Protestant dissenter, supporter of constitutional rights of Blacks, Christian whose ethics antagonized Jews, has, after all, no constitutional rights in New York City.

THE JUDGMENT

By judgment entered on July 30, 1975 petitioner was awarded $62,324.23 plus 6% interest from April 16, 1972 plus costs, was granted other relief including nullification of her dismissal and remand to the Board of Education for hearings at which she will have opportunity to be heard, upon the court's finding that she had been denied due process of law when she was fired. She was awarded $350.00 plus $100.00 costs against Marjorie O'Connell and the complaint was dismissed as against all other defendants.

Petitioner moved to amend the judgment to include $4,192.00 in covered dental expenses, denied on September 19, 1975 and the Board of Education moved for extension to file Notice of Appeal, granted on November 14th.

THE APPEAL

Petitioner filed timely notice of appeal and appealed from all parts of the judgment concerning defendants other than Marjorie O'Connell and the Board of Education and as to them she sought greater relief. Briefs were filed by petitioner, the Board of Education, the New York State Supervisory Committee, the district attorneys, and the New York State Division of Human Rights filed a letter; other defendants did not answer.

Because the appeal was multi-faceted and with numerous defendants petitioner filed an appendix of 300 pages to show (1) the seriousness of the lawsuit and the specificity of her claims; (2) obvious

contradictions in the district court's own orders; and (3) especially the unreasonable and continuing suppression of evidence without reason.

The Board of Education raised an argued the following points: (1) that petitioner was not deprived of any federally protected right; (2) res judicata and collateral estoppel; (3) and the Board of Education not being a "person" within the meaning of 42 U.S.C. 1983.

Petitioner raised and argued the following points: (1) that, based upon the allegations, the case was especially important, dealing with right of dissent and free speech and with racial-religious discrimination in the largest public school system; (2) that jurisdiction also existed under 42 U.S.C. §1981 in the light of the petitioner having worked for rights of Blacks; (3) that the various dismissals of agencies and their employees and others were wrong in the light of a) federal question jurisdiction under

U.S.C. 1331(a), b) allegations of conspiracy, c) suppressed evidence, d) existence of triable issues of fact; (4) that interpretation of cases made clear jurisdiction under 42 U.S.C. 1983; (5) that defendant Marjorie O'Connell should not have been penalized merely to the extent of $350.00 plus $100.00 costs; (6) that the court had wrongly assumed that petitioner was anti-Jewish and decided important issues on Jewishness versus non-Jewishness adversely to petitioner; (7) in the light of the allegations that there was no immunity for the defendants and Mary Meade should have been required to pay damages; (8) that the court was wrong in deducting $20,974.15 plus interest from the backpay award; (9) that petitioner was entitled to $4,192.00 plus interest for covered dental expenses; (10) that on the basis of lack of hearing and lack of notice of hearing concerning the Board of Education's medical examination that petitioner's suspension without pay as

well as her dismissal was required to be dismissed as a matter of law; (11) that it was wrong for the court to fail to convene a three judge court to decide the constitutionality of the New York State Education law and the Board of Education By-Laws under which petitioner was dismissed; (12) that the court was empowered to grant relief even beyond that which she requested where there was invasion of constitutional rights. (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388.

The Court of Appeals essentially, by a two-to-one decision, did the following: reduced the lawsuit to a mere controversy of a series of medical appointments; reached no real legal issue; granted the appeal of the Board of Education and reversed the backpay award on incorrect facts; refused to consider any part of the appeal raised by petitioner, stating that

it need not reach any of the issues; affirmed the dismissals of all of the other defendants and decided all of the above on erroneous facts. The dissenting opinion called the majority conclusion as ignoring both common sense and trial court findings of fact.

REASONS FOR GRANTING THE WRIT

1. It was totally unjust for the Second Circuit Court of Appeals to refuse to consider any part of the appeal of petitioner and to sweep the matter aside by stating, without reason, except concerning unrelated matter, that it need not reach the issues.

2. It was wrong for the Court of Appeals to reverse the award of $62,324.23 plus interest and other relief on the basis of erroneous facts, the mistake being its finding that petitioner was absent from the Board of Education meeting on July 22, 1970 (and therefore caused her own dismissal) whereas, in fact, petitioner was not absent,

but present, and it was also unfair for the Court to deny without opinion, petition for rehearing, especially considering that petitioner had offered proof of correct facts.

3. This is not the kind of a lawsuit that concerns one individual on a small matter, but concerns the largest public school system in the world and violation of constitutional freedoms not only to petitioner but to all white protestants in New York City and Blacks. This court has stated that vigilant protection of constitutional freedoms is nowhere more vital than in American Schools. (Shelton v. Tucker, 364 US 479 [1960] quoted in Keyishian v Board of Regents, 385 US 589 [1976], Tinker v Des Moines Independent Community School District, 393 US 503 [1969].

4. This lawsuit concerns the vital matter of right of a public school teacher and guidance counselor to criticize members

of the administration and supervisors and to grieve through channels and to sue for redress because of unfair treatment to Black students and White Protestant staff by Jewish supervisors. This court has indicated that where these First Amendment rights are involved it would look most closely least the rights be infringed under the guise of regulating conduct. Ashton v Kentucky, 384 US 195 [1969]).

5. Evidence was and remains suppressed and proof of conspiracy was prevented by the court, and allegations of conspiracy were essentially ignored, although that aspect of the lawsuit touched on the important matter of preventing recurrence to others of the constitutional deprivation suffered by petitioner.

6. In failing to reach any issue of petitioner's appeal the Second Circuit essentially contradicted its own decisions. In Kinsella v Board of Education of School District No. 7,

et. al., a three judge court declared unconstitutional New York State Education law concerning discipline of teachers in junior high schools, but when petitioner sought such declaration of the New York State Education law concerning discipline of teachers in high schools, with similar provisions, the matter was denied with no reason given for failing to reach the issue.

8. The Second Circuit has contradicted the Ninth Circuit which did not permit the medical examination of college staff without constitutional protections (Stewart v Pearce, supra) but this circuit in the instant lawsuit has assented to such unconstitutional procedures concerning psychiatric examination of the petitioner.

9. The affirmation of the pre-trial dismissals of many of the defendants had nothing to do with the opinion delivered by the circuit court, for, indeed, the discussion of due process at the point of dismissal was not related in any way to the

defendant municipal and state agencies. Yet those agencies whose function it was to remedy racial injustice participated in it and have at the same time become essentially immune from the allegations of this lawsuit.

10. This lawsuit deals with the vital matter of freedom from being part of the illegal and racially oriented strikes against the New York City public schools that have been called by the largely Jewish United Federation of Teachers when it opposed matters of interest to Blacks. Such freedom must be upheld by this Court.

11. This lawsuit raises a vital question as to whether in New York City the Black minority and the White Protestant minority (numbering about 7% of the New York City population) are deprived particularly in the public schools by a Jewish majority in those schools, and whether the matter of discrimination along the lines of identifi-

able groups of Jew and Gentile and not merely Black and White is ripe for consideration.

12. Since there has been a breakdown of the judicial processes in this lawsuit as petitioner sought to uncover facts touching people in high public position, supervision by this court is absolutely essential.

13. Petitioner's job, salary, livelihood and professional reputation are all at stake in this lawsuit.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted to review the decisions of the courts below and to decide the questions presented herein.

Respectfully,

Ruth E. Buck

Ruth E. Buck
Petitioner, pro se

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that I, residing at 133-54 Avery Ave., Flushing, New York 11355 and not a party in this proceeding, on October 13, 1977 served a true copy of the foregoing petition by personal service upon all of the defendants or their attorneys listed immediately following the caption on the first pages of this petition located in New York City and as to those located outside of the limits of the City of New York I served a true copy of the foregoing petition upon them by mail, postage prepaid and in a proper wrapping by depositing same in a depository under the exclusive custody of the United States Postal Authorities.

Donald J. Buck

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK ...

-and-

THE DIVISION OF HUMAN RIGHTS OF THE STATE OF NEW YORK; JOSEPH SPERAZI - Field Representative, WALTER P. OFFUT, JR., - Senior Field Representative, JEAN MAC PHERSON - Regional Director, ARTHUR STERN - Area Director, each of the aforementioned individually and as employees of the Division of Human Rights of the State of New York;

...

Defendants.
----------x

February 10, 1972

Docket No. 71-C-954

Appearances:

RUTH E. BUCK
Plaintiff, Pro Se

HENRY SPITZ, ESQ.
Attorney for Defendants New York State Division of Human Rights, Arthur Stern, Jean MacPherson, Walter P. Offut, Jr., and Joseph Sperazi

By: HOWARD HERTZBERG, ESQ.
of Counsel

J U D D, J.

MEMORANDUM AND ORDER

Two motions in this civil rights action are dealt with in this memorandum. Plaintiff is a former high school guidance counselor who was dismissed by defendant Board of Education for insubordination in failing to report for a psychiatric examination, and who asserts discrimination against her as a white Anglo-Saxon Protestant and as a member of the teaching staff who refused to take part in illegal strikes.

The first motion is by the State Division of Human Rights and individual em-

ployees of the State Division to dismiss the complaint on the merits for a variety of grounds. The motion fails to specify the rules or statutes on which it is based, as required by Rule 9(d) of the General Rules of this court. Since it is based on affidavits and other matters than the pleadings, it will be treated as a motion for summary judgment under F.R.Civ.P. 12 (b) (6) and 56.

The second motion is plaintiff's cross-motion to require the moving defendants to pay her reasonable expenses in responding to the motion and affidavits, which she asserts were filed in bad faith and for the purpose of obstructing justice.

Other pending motions will be dealt with in a separate memorandum.

THE COMPLAINT

The 25-page complaint names eight groups of defendants:

1. The Board of Education of the City of New York and 21 employees or officers of the Board, including the trial examiner who sustained the charges which had been filed against plaintiff;

2. The State Division of Human Rights and four of its staff;

3. The Commission of Human Rights of the City of New York and three of its employees, only one of whom is named other than as a "John Doe'

4. The New York State Supervisory Committee, which plaintiff says was set up to investigate and protect teachers from harassment following the 1968 teachers' strikes and two of its attorneys;

5. The Corporation Counsel of the City of New York and two of his legal staff;

6. The District Attorney of Brooklyn and four of his employees whose true

names are not known to plaintiff;

7. The District Attorney of Manhattan and two of his employees, only one of whom is named; and

8. Four attorneys who represented plaintiff in the past, and the late Justice Frederick Backer of the New York State Supreme Court.

The complaint against the two District Attorneys and their legal staffs, part of the sixth and seventh groups of defendants, was heretofore dismissed on motion.

Plaintiff is a citizen of the United States, a resident of New York City and was a tenured high school guidance counselor until her dismissal.

The crux of her complaint stems from various incidents of on-the-job harassment and suspensions without pay which she claims were part of a conspiracy to dis-

criminate against her because of her white Anglo-Saxon Protestant ethnic background. Her complaint against the State Division of Human Rights and the Commission of Civil Rights of the City of New York and other enforcement agencies stems from their alleged failure adequately to handle her complaint at the administrative level.

She was suspended without pay on December 8, 1969 on the recommendation of defendant Jacob Zack, Assistant Superintendent of High Schools, and defendant Dr. Sidney Rosenberg, Assistant Superintendent in Charge of Personnel, for insubordinate refusal to appear for a psychiatric examination. She asserts that the requests for psychiatric examination were prompted by letters from defendant Morton Selub, Principal of Franklin K. Lane High School, and defendant Sheldon

Wein, a teacher at the high school, and that these letters were in retaliation for her having filed a complaint with the State Division of Human Rights concerning "the scandalous activity" at Franklin K. Lane High School.

Plaintiff also alleges discrimination in having been denied various jobs in the public school system after she had been "excessed" (transferred) at the high school where she had been working.

Plaintiff alleges that when she first arrived at the State Division of Human Rights, defendant Joseph Sperazi, Field Representative, suggested that she return home before making an official complaint, and that in the interim he notified the New York City Board ofEducation and gave them an opportunity to submit a "libelous report" concerning her need for a psychiatric examination. She accuses defendant

Walter P. Offut, Jr., a Senior Field Representative of the State Division of Human Rights, defendant Jean MacPherson, Regional Director of the State Division and defendant Arthur Stern, Area Director of the State Division, of joining in this conspiracy to "obstruct justice" and write a false report.

Other Documents

In addition to affHavits of defendants Offut and Sperazi contesting some of plaintiff's statements of facts, the State Division has submitted;

(a) Copies of plaintiff's complaint verified June 25, 1968 on a printed form of the then State Commission for Human Rights;

(b) Three pages of an interoffice memorandum dated August 12, 1968 from defendant Offut to defendant Stern reporting an investigatory conference held in the

office of Regional Director defendant Jean MacPherson on July 12, 1968 and attended by Mrs. Buck, Mr. Offut, and Mr. Frederick K. Williams, Assistant Superintendent in charge of Intergroup Relations, and also by defendants Daisy K. Shaw, Director of the Bureau of Educational and Vocational Guidance, Morton Selub, Principal of Franklin K. Lane High School, Elizabeth C. O'Daly, Superintendent of School District No. 19 and Mary Cohen, Assistant Principal and Administrative Assistant in charge of Guidance at Franklin K. Lane High School;

(c) A letter from plaintiff to Miss MacPherson dated August 12, 1968 stating that after consulting an attorney she had determined to follow his recommendation that she "first try to work things out with the Board of Education by asking them for a transfer from my present school to another school." The letter concluded

> I request that this complaint be dropped and I would so much appreciate your advising me promptly that permission to withdraw is granted. Thank you for your attention in this matter.

(d) An interoffice memorandum to the files from Arthur W. Stern, Regional Director, dated August 28, 1968 stating that the complaint was closed, upon withdrawal by complainant.

The memorandum about the investigatory conference stated, among other things, that plaintiff was not "excessed" in February 1967 but was granted maternity leave, which automatically makes the position become vacant; and that when she requested termination of her leave, six months after giving birth, she applied along with 22 other persons for a temporary assignment as counselor in the field of Business Careers in a College-Bound Program, that the coordinator of the project felt that it re-

quired certain different qualifications and that "he chose a Mrs. Winkler who is also white and Protestant."

No relief is sought against the State Division or its staff except that they be ordered to pay plaintiff's court costs for all cases which she has brought, and reasonable costs in bringing this action, and that punitive damages be assessed against the individual defendants (but not the State Division) to be paid to the City of New York.

Discussion of Law

The claim of miscellaneous damages against the State Division must fall for two reasons. In the first place, the State Division is not a "person" who is subject to suit for damages under the Civil Rights Act. 42 U.S.C. § 1983; Monroe v. Pape, 365 U.S. 167, 190-91, 81 S.Ct. 473, 486 (1961) (municipal corporation);

O'Reilly v. Wyman, 305 F.Supp. 228 (S.D. N.Y. 1969) (State Department of Social Services). In the second place, a determination by a state investigatory body that it will not proceed on a particular complaint is a discretionary matter which federal courts will not ordinarily review. Green v. City of Glen Cove, 332 F. Supp. 916, 918 (E.D.N.Y. 1971).

The individual defendants are not subject to any liability if the facts set forth by plaintiff fail to show "intentional or purposeful discrimination." Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944). The Supreme Court stated in the Snowden case that

> A discriminatory purpose is not presumed...; there must be a showing of "clear and intentional discrimination".

A showing of selective law enforcement does not support an action for denial of equal protection of the laws without some

evidence of discrimination regarding a particular person or class of persons. Moss v. Horning, 314 F.2d 89, 93 (2d Cir. 1963). For instance, in Kletschka v. Driver, 411 F.2d 436, 447 (2d Cir. 1969), the court held that a Veterans Administration doctor who was transferred against his will could not defeat a summary judgment motion in a civil rights action for denial of equal protection where it appeared that defendant's action was directed against him as an individual rather than as a member of of some class or race. See also Birnbaum v. Trussell, 371 F.2d 672, 676 (2d Cir. 1966) (a white doctor) discharged because he could not get along with black aides).

In Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964), the court said:

> Were we to hold this complaint sufficient, we would be inviting every

> party to a state proceeding angered at delay to file a complaint in this court reciting the history of his state case and concluding with a general allegation of conspiracy.

The thesis of Mrs. Buck's complaint appears to be that individuals who disagree with her interpretation of the facts surrounding her dismissal by the Board of Education thereby join an ongoing conpiracy against her and member of her race.

The complaint against staff members of the State Division is particularly lacking in merit, because she withdrew her complaint in the State Division before a decision was actually made.

The claim of denial of due process may be separate from the denial of equal protection. Although denial of due process is not covered by the conspiracy provisions of Section 1985(3), a conspiracy to deny due process is covered by Section 1983. Birnbaum v. Trussell, 371 F.2d 672, 676

BEST COPY AVAILABLE

(2d Cir. 1966). Evidence of purposefulness is still necessary where there is a claim of denial of due process. Skolnick v. Spolar, 317 F.2d 857, 859 (7th Cir. 1963), cert. denied, 375 U.S. 904, 84 S.Ct. 195 (1963).

Mrs. Buck was afforded a full investigatory conference by the State Division with the four individual defendants present. The fact that the State Division in its report of the conference chose to believe some of the explanations that were proffered concerning the Board of Education's behavior toward her, is not ground to charge a denial of due process. Powell v. Workmen's Compensation Board, supra.

Mere failure to act on Mrs. Buck's complaint within fifteen days, as set forth in the Executive Law, § 297(2), is not a denial of due process. The time

provisions of Section 297(2) have been held by the state courts to be directory rather than mandatory. Moskal v. State Division of Human Rights, 36 A.D. 2d 46, 319 N.Y.S. 2d 358 (App.Div. 4th Dept. 1971).

The staff members of the State Division are therefore entitled to summary judgment dismissing the complaint.

Plaintiff would have no right to charge the costs of answering the motion against the defendants, even if there were less merit in the motion than the court has found.

It is ORDERED that the motion for summary judgment be granted and that the complaint be dismissed as against the second group of defendants, the Division of Human Rights of the State of New York, Joseph Sperazi, Walter P. Offut, Jr.,

Jean MacPherson and Arthur Stern;

and it is further

ORDERED, that plaintiff's cross motion be denied.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

February 17, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; THE DISTRICT ATTORNEY OF THE BOROUGH OF BROOKLYN; THIS DISTRICT ATTORNEY OF THE BOROUGH OF MANHATTAN, et al.,

Defendants.
----------x

Appearances:

RUTH E. BUCK, Plaintiff, Pro Se

HON. LOUIS J. LEFKOWITZ,
Attorney General, State of New York
Attorney for Defendants Frederick Backer and Detectives of the Kings County District Attorney's Office

By: BENTON J. LEVY, ESQ.
Assistant Attorney General

J U D D, J.

MEMORANDUM AND ORDER

(Justice Backer and Detective Buda)

A motion by the Attorney General of New York as "attorney for defendants" seeks to dismiss the complaint for failure to state a claim on which relief can be granted. F.R.Civ.P. 12(b) (6). The accompanying Memorandum of Law indicates that the motion was made on behalf of Hon. Frederick Backer, a Justice of the Supreme Court, and on behalf of detectives assigned to the office of the District Attorney of Kings County.

A general description of the complaint is contained in this court's Memorandum and Order dated February 10, 1972.

The only basis for relief against Justice Backer as stated by the plaintiff is that he believed untrue testimony submitted to him by defendants in a case before him. He has died since the motion was brought, but it is appropriate for the motion still

to be considered to avoid any question concerning the survival of the cause of action. It is clear that the claim against him falls within the immunity of a judicial officer in civil rights actions. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967).

On October 15, 1971, this court granted in open court a motion to dismiss the complaint as against Kings County District Attorney Eugene Gold, New York County District Attorney Frank S. Hogan, and their respective legal staffs pursuant to Rule 12 (b) (6). It was in plaintiff's affidavit in opposition to the motion that it was initially indicated that the pseudonym "John Jones", listed in the complaint, was intended to refer to a Detective Buda from District Attorney Gold's office.

Plaintiff alleges in her complaint

that Detective Buda occupied an office in the guidance suite at Franklyn K. Lane High. School on assignment from the Kings County District Attorney. The gravamen of the complaint is that when plaintiff requested Detective Buda's aid in prosecuting claims she asserted against individuals in the school system, he merely made a racial slur about the individuals involved instead of recommending any action.

Plaintiff does not state why Detective Buda was obligated to aid her, or how he could have prevented the acts allegedly perpetrated against her. The racial slur attributed to Detective Buda was clearly not directed at plaintiff.

The only other allegations in the complaint applicable to Detective Buda are the general claims found at the opening of the complaint (pp. 2-3), which are framed in broad language closely paralleling that used in 42 U.S.C. §§ 1983, 1985, and 1986.

A complaint in a case like this must set forth facts showing some intentional and purposeful discrimination. Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397 (1944). Plaintiff is bound to do more than merely paraphrase statutory language. Vague and conclusory allegations are insufficient to state a claim. Powell v. Workman's Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964).

Plaintiff has failed to state a claim upon which relief may be granted against the parties named.

It is ORDERED that the complaint be dismissed as against Justice Frederick Backer and as against Detective Buda, and any other non-legal employees of the District Attorneys' offices.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

March 10, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

-and-

THE NEW YORK STATE SUPERVISORY COMMITTEE: Norman Frankel - Attorney and former Investigator, Harold G. Israelson, Attorney and former Chairman, each of the afore-mentioned individually and as employees of the New York State Supervisory Committee; et al.,

Defendants.
----------x

Docket 71-C-954

Submitted by:

RUTH E. BUCK
Plaintiff, Pro Se

Appearance:

ROBERT D. STONE, ESQ.
Attorney for Defendants New York State Supervisory Committee, Norman Frankel and Harold G. Israelson

By: JOHN P. JEHU, ESQ.
Of Counsel

J U D D, J.

MEMORANDUM AND ORDER

This is a motion by the defendants State Supervisory Committee, Norman Frankel and Harold G. Israelson, for an order granting summary judgment pursuant to F.R.Civ.P. 56. The court file relevant to the motion includes a supporting affidavit and a number of exhibits attached to the answer, as well as an affidavit in opposition filed by plaintiff.

A general description of the complaint in this civil rights action, which originally named eight groups of defendants, is contained in this court's Memorandum and

Order dated February 10, 1972, which dismissed the complaint as against the State Division of Human Rights and members of its staff.

Plaintiff's claim against the New York State Supervisory Committee and the two individuals arises from their alleged refusal to file advisory charges of harassment with the state Education Commissioner against defendant Mary Cohen, an Assistant Principal at Franklin K. Lane High School. (See complaint at p. 21). Mr. Frankel, the investigator assigned to plaintiff's case, is specifically charged with obstructing justice by finding no merit in plaintiff's charges. Mr. Israelson, former chairman of the Committee, is alleged to have reported that the Committee determined not to appoint a hearing officer. The complaint asserts that he thereby obstructed justice and particiv

pated in the overall conspiracy alleged in the main body of the complaint, in violation of Sections 1983, 1985, and 1986 of the Civil Rights Law. 42 U.S.C. §1983, et seq.

FACTS

On January 3, 1969, Mrs. Buck telephoned the State Supervisory Committee to complain of specific instances of discrimination and harassment by school officials at Franklin K. Lane High School, allegedly stemming from her refusal to participate in a strike organized by the United Federation of Teachers. The primary harassment alleged in this 'phone call was that plaintiff received an unduly large percentage of students in her case load following the settlement of the teachers' strike. See "Report of Complaint" filed by Joseph Tocci of the Supervisory Committee on January 3, 1969, Exhibit A attached to defen-

dants' answer.

Defendant Frankel visited the plaintiff at Franklin K. Lane High School on January 6, 1969 and was presented with a formal "memorandum of harassment" by Mrs. Buck. An extensive interview was conducted by Mr. Frankel, covering both Mrs. Buck's position at the school and the specific details of her harassment charges. In addition to her primary complaint of deliberate overloading of case assignments, Mrs. Buck mentioned several discourtesies by members of the administrative staff, which Mr. Frankel concluded were mere routine school procedures, well within the discretion of the administration. (See Exhibit E attached to defendants' answer).

Defendant Frankel, in a report dated January 8, 1969 (Exhibit B) presents a thorough analysis of plaintiff's charge of intentional overloading. This report in-

dicates that Mrs. Buck's statistical information as to the respective caseloads of her co-counselors came from an unidentified record room clerk. Information suplied by school authorities based upon official records contradicted the plaintiff's allegations. (Exhibit E). Therefore, Mr. Frankel concluded that "there is nothing arbitrary in the assignment of guidance work to each of the grade guidance counselors."

On January 8, 1969, the day after defendant Frankel interviewed Principal Morton Selub and Assistant Principal Mary Cohen, Mrs. Buck telephoned his office to request a copy of his report. Upon learning that Mr. Frankel had no authority to furnish her a copy, plaintiff requested to know whether he included in his report information she had funished him concerning a psychiatric examination which school auth-

orities ordered her to undergo. Upon learning that this information was included, plaintiff made strenuous objections. Mr. Frankel explained that he had no discretion to exclude facts furnished him from his report.

After receiving Mrs. Buck's reply to the statistical records supplied by school authorities and a final letter dated April 4, 1969, the Committee closed its file on April 14, 1969, based upon the investigator's conclusion that there was insufficient evidence to warrant a charge of harassment against the Assistant Principal.

A series of reports by Mr. Frankel concerning plaintiff's charges are annexed to the answer. The court's review of these reports indicates a serious attempt by Mr. Frankel to deal with the charges and the responses of those accused, and to determine whether they justified formal administrative action. Nothing in the reports suggests that plaintiff's being a non-striker or a WASP played any part in the recommendations.

Plaintiff's opposing affidavit repeats some of her initial charges of harassment, and asserts that defendants' papers are mere "half-truths," but it does not contain any facts to show that this group of defendants violated any of her federally protected rights.

Plaintiff was granted time for further response to the motion after it had been submitted. She filed a notice to take the deposition of defendant Frankel, scheduled for April 11, 1972. Her papers do not indicate how such a deposition can produce any information relevant to the motion, even though he may be able to provide information concerning the acts or attitudes of other defendants.

Additional facts are set forth in a memorandum of law filed just before this Memorandum was completed. The facts relate to plaintiff's claim against the Board of Education and its employees, but do not bolster her claim against the State Supervisory Committee group. Nor does plaintiff set forth any facts that support her conclusory allegations of conspiracy against these defendants.

Discussion of Law

The State Supervisory Committee was created under the executive authority of the Commissioner of Education of the State of New York pursuant to Sections 301 and 305 of the Education Law. The Committee has jurisdiction throughout the New York City public school system and is charged with the prompt investigation of claims against a board, school officer, or employee regarding any failure to take appropri-

ate action to enforce the rights of teachers and other professionals within the system. (See defendants' answer).

The Committee has no direct power to hold formal hearings, but merely conducts investigations leading to the issuance of remedial orders which are purely advisory. Note that the section of the Education Law which deals with the quasi-judicial authority of the Commissioner (§310) is not the basis for the Committee's delegated authority.

Since the Supervisory Committee performs an investigative rather than a quasi-judicial function, individual employees do not benefit from the "official immunity" rule of Pierson v. Ray, 386 U.S. 550, 553-54, 87 S.Ct. 1217-18 (1967), and Fanale v. Sheehy, 385 F.2d 866, 869 (2d Cir. 1967).

To the extent that the plaintiff seeks

damages against the administrative body known as the State Supervisory Committee, relief must be denied, since the damage remedy provided by the Civil Rights Act does not cover subdivisions of the city or state government. Monroe v. Pape, 365 U.S. 167, 190-1, 81 S.Ct. 473, 486 (1961); O'Reilly v. Wyman, 305 F. Supp. 228 (S.D.N.Y. 1969).

Plaintiff asserts that the named individuals have violated her right to equal protection of the law. In order to succeed on this theory, plaintiff must set forth facts tending to show that the discrimination was "intentional or purposeful". Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944).

Though plaintiff states in the opening of her complaint that she has been discriminated against as a member of the White-Anglo-Saxon-Protestant ethnic group,

she alleges no acts which indicate any such violation by the State Supervisory Committee or the named individuals. The sole factual basis for plaintiff's assertion of ethnic discrimination is the broad allegation of conspiracy found in her complaint, couched in the language of Sections 1983 and 1985. This court held in its Memorandum and Order of February 17, 1972 that vague and conclusory allegations are insufficient to support a claim under the Civil Rights Act. Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1967).

Plaintiff has also failed to give any factual support for her assertion that the State Supervisory Committee or the named individuals discriminated against her for her refusal to partake in strike activities.

Plaintiff's due process claim is e-

qually without merit. Where damages are sought under the Civil Rights Act for such a denial, evidence of purposefulness is still necessary. Skolnick v. Spolar, 317 F.2d 857, 859 (7th Cir.), cert. denied, 375 U.S. 904, 84 S.Ct. 195 (1963).

Mrs. Buck was afforded a complete documented investigation of her charges of harassment by a state body constituted to provide a mere advisory function. The procedural requirements of due process must reflect the nature of the proceedings under review and the interests to be protected. Escalera v. New York City Housing Auth, 425 F.2d 853, 867 (2d Cir. 1970).

This court refuses to hold that persons related to the Committee "obstructed justice" by their mere failure to agree with the plaintiff's charges. Defendant Frankel in his report did not "obstruct justice" by choosing to believe what the

official records at Lane High School showed rather than the statistics included in Mrs. Buck's complaint. Neither was he in error for refusing to excise facts from his report which might have proven harmful to the plaintiff's case.

Messrs. Frankel and Israelson are therefore also entitled to summary judgment.

It is ORDERED that the motion for summary judgment be granted and that the complaint be dismissed as against the fourth group of defendants, the New York State Supervisory Committee, Harold G. Israelson, and Norman Frankel; and that the notice of deposition of Norman Frankel be vacated, without prejudice to a new notice for his examination as a witness on notice to the attorneys for other defendants.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

March 14, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------x

Submitted by:

RUTH E. BUCK
Plaintiff, Pro Se

Appearance:

HON. J. LEE RANKIN
Corporation Counsel, City of New York
Attorney for Defendants

By: PAULA J. OMANSKY, ESQ.
Attorney
of Counsel

J U D D, J.

M E M O R A N D U M

Decision of the motion by the New York City defendants to stay plaintiff's taking of depositions will be deferred until argument has been heard on the motion of said defendants for summary judgment, so that the court may better judge the relevance of the proposed depositions in the light of any answering papers which may be served by the plaintiff. The statement of facts in plaintiff's opposing memorandum is not keyed to the filed papers so that the court can determine how much is based on filed papers and how much is new matter not yet supported by affidavits as required by F.R.Civ.P. 56(e).

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------x

Appearances:

RUTH E. BUCK
Plaintiff, Pro Se

WILLIAM GOFFEN, Esq.
Defendant, Pro Se

HON. J. LEE RANKIN
Corporation Counsel, City of New York
Attorney for New York City Defendants
By: PAULA J. OMANSKY, Esq.
Attorney, of Counsel.

J U D D, J.

MEMORANDUM AND ORDER

(Taking Depositions by Tape; Stay of Certain Depositions)

This memorandum relates to (1) plain-

tiff's motion to take testimony by tape recorder; (2) defendant Goffen's motion to stay the taking of his deposition; and (3) the Corporation Counsel's motion to stay the taking of depositions of City defendants.

The court has authority to permit the taking of testimony by other than stenographic means pursuant to F.R.Civ.P. 30(b)(4). The high cost of examinations before trial has been the subject of public comment. See Letter of Lyman Stansky, N.Y.L.J., Apr. 13, 1972, p. 4.

Plaintiff proposes to take depositions by tape recorder, and to prepare two simultaneous tapes, one of which will be filed in the office of the Clerk of Court, as assurance of the authenticity of the tape which she retains. Provided that she furnishes a typewritten transcript of one tape to the party deposed, at her own expense,

for good-faith correction and signature, this seems to be a proper procedure.

Defendant Goffen has asked for a stay of his deposition pending decision of his motion for summary judgment, which is supported by voluminous papers. The Corporation Counsel, for the bulk of the City defendants, has moved for a stay of their depositions pending determination of his motion for summary judgment, which the court still has under advisement. The Corporation Counsel does not object to taking the deposition of defendant Mary Cohen concerning records of allocation of cases of students for counseling, a subject pertinent to another motion submitted by plaintiff. It would be preferable to have defendant Cohen's deposition concluded at one time rather than divided into parts, and to have any relevant documents produced at the time of the deposition.

It is ORDERED that depositions upon oral examination on notice of plaintiff may be recorded on tape, provided that a duplicate original of the tape is filed in the office of the Clerk of Court within one week after the taking of the deposition, and that an original transcript is provided to the person deposed, at the expense of plaintiff, for bona fide correction, signature and prompt filing in the office of the Clerk of Court; and it is further

ORDERED that the taking of depositions of defendant Goffen and of all defendants represented by the Corporation Counsel, other than Mary Cohen, be stayed until further order of the court; and it is further

ORDERED that defendant Mary Cohen produce at the time of her deposition all documents in her possession relevant to the issues in the case.

Dated: Brooklyn, N.Y.
April 19, 1972

/s/
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

April 19, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., THE NEW YORK STATE SUPERVISORY COMMITTEE: Norman Frankel, Harold G. Israelson, etc., et al.,

Defendants.
----------x

Submitted by:

RUTH E. BUCK
Plaintiff, Pro Se

ROBERT D. STONE, Esq.
Attorney for Defendants Frankel, Israelson and The New York State Supervisory Committee

Appearance:

HON. J. LEE RANKIN
Corporation Counsel, City of New York
Attorney for City Defendants
By: PAULA OMANSKY, Esq.
Attorney, Of Counsel

J U D D, J.

MEMORANDUM AND ORDER DENYING MOTION UNDER RULE 60(b)

Plaintiff has asked for relief from this court's Memorandum and Order dated March 10, 1972 on the ground of "mistake, misrepresentation, deceit or fraud" pursuant to F.R.Civ.P. 60(b).

The order in question dismissed her civil rights action as against the New York State Supervisory Committee and two of its attorneys, Norman Frankel and Harold G. Israelson. Plaintiff has not shown any mistake in the court's Memorandum and Order. Her attack is on the facts which the State Supervisory Committee found, but the Committee's failure to detect what she describes as fraud would not furnish a basis for a civil rights action.

Plaintiff's notice of motion assumes that the order prevents her from proceed-

ing with discovery concerning the size of her case-load following the teachers' strikes of 1968.

The elimination of the State Supervisory Committee as a party does not affect petitioner's right of discovery. The stay of depositions, with respect to the City defendants and defendant Goffen is intended to avoid what may be unnecessary work by the parties during this court's consideration of the pending motions for summary judgment. By a separate order, examination of defendant Mary Cohen on oral deposition has been permitted.

It is ORDERED that the motion for relief under Rule 60(b) be denied.

Dated: Brooklyn, New York
April 19, 1972

U. S. D. J.

APPENDIX A - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

May 8, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

X

Submitted by:

RUTH E. BUCK
Plaintiff, Pro Se

Appearance:

HON. J. LEE RANKIN
Corporation Counsel, City of New York
Attorney for New York City Defendants

By: PAULA J. OMANSKY, ESQ.
Attorney
of Counsel

J U D D, J.

O R D E R

Plaintiff has made an oral application (via telephone) for access to roll books and other records to be used in her deposition of defendant Mary Cohen. All discovery, other than this deposition has been stayed by this court pending determination of motions for summary judgment.

Since it will expedite the conduct of defendant Cohen's deposition, it is

ORDERED, that defendants make available to plaintiff, at this courthouse or some other convenient place, all records needed to show the caseloads of guidance counselors during the time period covered by the complaint at least two weeks prior to the date set for the deposition.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

October 20, 1972

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------x

J U D D, J.

M E M O R A N D U M

In connection with the pending motions by the City defendants, the parties are invited to brief the following question:

> Is the right to refrain from membership in a labor organization or from participation in a strike called by such an organization one of the "rights", privileges, or immunities secured by the Constitution and

laws," which is actionable under 42 U.S.C. § 1983?

Briefs should be submitted by November 3, 1972.

/s/ ORRIN G. JUDD
U. S. D. J.

To:
RUTH E. BUCK, Plaintiff, Pro Se

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

By: PAULA OMANSKY, ESQ.
Assistant Corporation Counsel
of Counsel.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

December 15, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; Dr. Bernard E. Donovan - former Superintendent of Schools, Dr. Nathan Brown - former Superintendent of Schools, Dr. Irving Anker - former Superintendent of Schools, G. Gary Sousa - Law Secretary, Sheldon Wein - Teacher at Franklin K. Lane High School, Mary Cohen - Assistant Principal at Franklin K. Lane High School, Morton Selub - Principal at Franklin K. Lane High School, Elizabeth C. O'Daly - District Superintendent of School District #19, Dr. Jacob Zack - Assistant Superintendent in charge of High Schools, Dr. Beverly Lipschitz - Guidance Supervisor of School District #19, Daisy K. Shaw - Director of the Bureau of Educational and Vocational Guidance, Murray Cohn - Principal, High School of Commerce (now Brandeis High School), Evelyn Konigsberg - former Principal of Washington Irving High School, Charles Foy - Receptionist - Medical Division, Sarah Braphart - Secretary to Medical Director, Dr. Naomi Pool - Acting Assistant Medical Director, Dr. Murry G.

Fischer - former Assistant Medical Director, Dr. Sidney Leibowitz - Medical Director, Dr. Sidney Rosenberg - Asst. Superintendent in charge of Personnel, Dr. Theodore Lang - Deputy Superintendent in charge of Personnel, Allegedly Honorable Daniel Gutman - Trial Examiner, each of the afore-mentioned individually and as employees of the Board of Education of the City of New York;

-and-

THE COMMISSION ON HUMAN RIGHTS OF THE CITY OF NEW YORK: John Doe and James Doe (said names of John Doe and James Doe being fictitious, their true names being unknown to plaintiff), Robert Perez-Wilson - Acting Chief, Investigations Division, each of the afore-mentioned individually and as employees of the Commission on Human Rights of the City of New York;

-and-

THE CORPORATION COUNSEL OF THE CITY OF NEW YORK; Edith A.Gordon - attorney, Charles D. Maurer - attorney, each of the aforementioned individually and as employees of the Corporation Counsel of the City of New York;

-and-

Abraham Mark Levien - Attorney; William Goffen - Attorney; David Lubash - Attorney; Marjorie O'Connell - Attorney; Allegedly Honorable Frederick Backer - Justice of the Supreme Court of the State of New York - Borough and County of Manhattan - individually;

-and-

others, whose identities are not ascertained,

Defendants.

----------x

Submitted by:

RUTH E. BUCK
Plaintiff, Pro Se

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

By: PAULA OMANSKY, ESQ.
Assistant Corporation Counsel
of Counsel

A. MARK LEVIEN, ESQ.
Defendant, Pro Se

WILLIAM GOFFEN, ESQ.
Defendant, Pro Se

J U D D, J.

MEMORANDUM AND ORDER

In this civil rights action a series of motions are before the court for consideration: (1) a motion on behalf of the City defendants for summary judgment; (2) a motion by the City defendants to stay further discovery proceedings; (3) a

motion by the plaintiff to depose Bidabee Gloster and Peter Todaro without further delay; (4) a motion by defendant Goffen for summary judgment and for a stay of his deposition; and (5) a motion by defendant Levien for summary judgment and for a stay of his deposition.

THE ACTION

Plaintiff, a former high school teacher and guidance counsellor, has sued eight groups of defendants, described in this court's Memorandum and Order dated February 10, 1972. The City defendants are 6 Groups 1, Board of Education and certain employees; 3, Commission of Human Rights and certain employees; and 5, Corporation Counsel and two of his legal staff. Defendants Goffen and Levien are part of Group 8, plaintiff's former attorneys. The complaint has already been dismissed as against Groups 2, 4, 6 and 7 (State Division of Human Rights, State Supervisory

Committee, Brooklyn District Attorney, and Manhattan District Attorney.)

The complaint seeks reinstatement to plaintiff's former position with back pay and asks for costs and punitive damages (payable to the City of New York) against the individual defendants, and a refund of legal fees from the lawyers whom she retained.

The crux of the complaint stems from various alleged incidents of on-the-job harassment and suspensions without pay which plaintiff claims were part of a conspiracy to discriminate against her because of her white, Anglo-Saxon Protestant (WASP) ethnic background and because of her resistance to teachers' strikes.

The primary grievance is against the action of the Board of Education in dismissing plaintiff from her position because

of her failure to submit to a medical examination after a report requesting that she undergo a psychiatric evaluation. A series of notices to report for medical examination was interrupted by a court stay granted in aid of an unsuccessful Article 78 proceeding to forbid the medical examination as improperly motivated. Plaintiff's ultimate dismissal was proceeded by full evidentiary hearings and by a written report made to the Board of Education by a hearing examiner, defendant Daniel Gutman. Plaintiff was represented by counsel at these hearings. After her dismissal plaintiff, acting pro se, brought three unsuccessful Article 78 proceedings to review certain features of the Board of Education proceedings.

A separate grievance relates to various types of on-the-job harassment, including refusal of positions for which plaint-

iff was qualified, rearrangement of case loads, and derogatory letters and remarks.

Answers have been submitted by the moving defendants.

An abundance of affidavits, documentary exhibits, and other papers have brought the number of items presently docketed to at least 149.

Facts

Since defendants have moved for summary judgment, the court will set forth plaintiff's version of the facts except as they are otherwise established by documents or by uncontradicted allegations.

Plaintiff's career with the Board of Education began in September 1957 when she was appointed as a regular substitute at Seward High School. From September 1964 to June 1965 she was a guidance counselor at Franklin K. Lane High School. She was declared in excess at the time of

a reduction in the guidance staff at Lane, and ultimately was transferred to William Cullen Bryant High School, where she served from May 1965 to January 1967. She was on maternity leave from January 1967 to August 1967. She served again as guidance counselor at Franklin K. Lane High School from July 1967 to December 1969, when she was suspended without pay.

Plaintiff was born in the United States as Ruth E. Waltke and describes herself as being "of white, gentile, Protestant, German and Alsation parentage," married to a man of "white, gentile, Protestant background and descended from the American Revolution."

In May 1965 at the direction of defendant Daisy Katz Shaw, plaintiff attended a city-wide meeting of guidance counselors at which Dr. Eli Ginzburg was applauded by Mrs. Shaw for stating that "the white An-

glo-Saxon Protestants who he referred to as WASPS had done so much damage to our country that new people had taken over and the day of the WASP was over." She asserts that the discrimination against her began from that time.

A series of alleged incidents are described. In 1965 plaintiff refused to contribute to an advertising campaign to keep additional Negroes out of Franklin K. Lane High School, although informed that defendant Mary Cohen, the Assistant Principal, supported the campaign. She was "excessed" from Franklin K. Lane High School after one day of absence in 1965 and told to seek another job for the fall. She was given discourteous and uncouth treatment by Principal Evelyn Konigsberg of Washington Irving High School when she met with her about a position as guidance counselor. She was passed over for an op-

en position at Forest Hills High School in favor of Millicent Schuker, wife of the Principal. She was denied an opportunity to work on a special federally funded job for which she was qualified, because Ben Stern and Daisy Shaw recommended Elba Winkler, a Supervisor's wife. She was denied a counseling position with limited case load in favor of Helen Benjamin, a person with less seniority, selected by defendants Mary Cohen and/or Morton Selub. She finally was added to the guidance staff of William Cullen Bryant High School, but when she took a maternity leave in January 1967, the position was not held open for her as it had been during the maternity leaves of her colleague Shirley Weintraub, the wife of a Principal.

Plaintiff was reassigned to Franklin K. Lane High School, and reported for work on September 6, 1967, five days before a

scheduled strike by teachers. During this strike, she was locked out by Mr. Selub, her Principal. After the strike, she filed a grievance against Mrs. Cohen. The Disposition of the grievance is in dispute.

On May 14, 1968 plaintiff was granted tenure as a guidance counselor, on completion of three years of satisfactory service in that position. During her service as teacher and guidance counselor, plaintiff received many commendations for the high quality of her work from her supervisors. For the school year ending June 28, 1968, Principal Selub rated her as Satisfactory on an "S-U-D" scale. She was also rated Satisfactory by the Principal of the Bryant Youth and Adult Center, where she taught in the evenings.

In June 1968, defendant Morton Selub, Principal of Franklin K. Lane High School, submitted a report to Dr. Sidney Leibowitz,

Medical Director of the Board of Education, requesting that plaintiff be given a medical examination and attaching a statement of reasons. Mr. Selub asserted that plaintiff had not followed instructions from Mrs. Mary Cohen, as Administrative Assistant in charge of Guidance, but had written "frequent notes, memos, or letters, where telephone calls or personal contact would be more effective." Thereport described several incidents of allegedly strange behaviour, some observed by Mr. Selub and some reported by Mrs. Cohen, and by defendant Sheldon Wein, Assistant Dean of Boys. Some of the incidents had been brought to Mr. Selub's attention before he gave plaintiff a Satisfactory rating in June 1968. The report stated that the complaints against plaintiff were begun in September 1967, by unidentified deans and by Mrs. Mary Cohen, thus placing

the first incidents in the same month as the first teachers' strike.

On July 25, 1968, plaintiff was notified to appear on August 1, 1968 for medical examination, by a note signed by Dr. Leibowitz. The date was twice postponed because of the vacation plans of plaintiff and her husband, new notes being signed by defendant Murray Fischer, Assistant Medical Director. On September 6, 1968, about the time of the third date of examination, plaintiff obtained an order to show cause in an Article 78 proceeding brought on her behalf by attorneys A. Mark Levien and William Goffen, defendants herein, seeking to rescind the order for the medical examination. By stipulation of record, made in court on September 11, 1968, the Superintendent of Schools, defendant Bernard E. Donovan, agreed to take no proceedings to compel the medical exam-

ination or to punish plaintiff for failure to appear until the determination of the motion. The Corporation Counsel finally submitted an answer to the Article 78 petition on April 7, 1969. Mrs. Buck submitted a reply on May 9, 1969 and the matter was argued before Mr. Justice Backer on May 15, 1969. He rendered an opinion dated May 21, 1969 stating that the determination to request a medical examination was not arbitrary, capricious, or unreasonable, and directing that the petition be dismissed. An order dismissing the Article 78 proceeding was entered on July 24, 1969, and Mr. Goffen on August 11, 1969 filed a notice of appeal to the Appellate Division.

Meanwhile, in September 1968 the plaintiff had again refused to take part in a second teachers' strike, and was met daily by the striking Principal of Franklin K. Lane High School when she reported for work,

crossing picket lines. She asserts that the strikes were based on a Jewish-Negro conflict, with the thought of some people that the strikers favored the Jews and the non-strikers favored the Negroes, but that she was obeying the Taylor Law and the injunctions which the courts had granted. She sought help in getting into locked rooms and obtaining supplies, and asked to be protected from disruptive striking teachers, but her requests were ignored by District Superintendent of Schools Elizabeth O'Daly and by Superintendent of Schools Bernard E. Donovan.

After the strike, plaintiff was harassed by defendants Mary Cohen, Morton Selub, Elizabeth O'Daly, and Beverly Lipschitz, by rearrangement of case loads to add 20 additional classes to her already heavy load, by false charges, by being placed on hall patrol when other guidance

counselors were not so assigned by being called upon for repeated counts of her cases. She incurred the hostility of her Principal again in 1969 by siding with the students in connection with the Principal's expulsion of several hundred students, mostly black, without any hearings. See Knight, et al. v. Board of Education, 69-C-326. Three hundred of the ousted students were in plaintiff's caseload, including black students on the honor roll; but Mrs. Cohen forbade plaintiff to go near the office where students were being selected for ouster.

Since Mr. Goffen's appeal did not provide for a stay, plaintiff received further notices to appear for a medical examination and finally, on November 6, 1969 went to the Medical Office, but refused to sign in or fill out a form until she had seen the Supervisor. After waiting a half hour for the supervisor,

she left without seeing him, saying that it was 3:00 o'clock and her working hours were over, and she had not been able to bring an adviser as the rules permitted. Among the City defendants are Charles Foy (now deceased), the receptionist at the Medical Office, Sarah Braphart, secretary to the Medical Director, and Dr. Naomi Pool, whom plaintiff met at the Medical Office, and who had written a note describing plaintiff's attitude as "intransigent."

Later in November 1969, plaintiff wrote a letter to defendant Jacob Zack, Assistant Superintendent of Schools, sharply critical of the alleged cruel treatment of about 15 students in her load.

A short time later, on December 5, 1969, defendant Nathan Brown, Acting Superintendent of Schools, notified plaintiff that she was being suspended without pay and charged with insubordination, conduct

prejudicial to the good order of the service and violation of the by-laws in refusing to submit to a medical examination. The Board of Education appointed former Judge Daniel Gutman as Trial Examiner. Hearings were held before him on February 3, February 19, and March 6, 1970, at which plaintiff was represented by defendand David Lubash as attorney, and the Superintendent of Education was represented by G. Gary Sousa, Secretary to the Board. All witnesses for the Board were cross-examined by plaintiff's attorney, and she called witnesses and introduced exhibits on her own behalf.

The Trial Examiner issued a report on April 22, 1970 in which he found that plaintiff's reasons for not reporting for medical examinations were whimsical and inadequate and represented intransigent defiance of authority. He suggested two alter-

natives for the Board to adopt. The first alternative was expressed in these words:

> Preliminarily to offering my recommendations, it is respectfully suggested, in view of respondent's years of service, and the testimonials to her past merit, that the Board of Education consider the advisability of giving respondent an opportunity to submit to a medical examination, pending the final determination of this proceeding.

In the next paragraph, the Trial Examiner recommended that the Board sustain the action of the Superintendent in suspending plaintiff without pay, and make the suspension permanent and discharge her from further service. The report was not sent to plaintiff until July 23, 1970. It was on the calendar of the Board of Education for July 22, 1970.

At this crucial point, plaintiff was deserted by her counsel, left without information of the provisions of the report, and misled as to the time of the Board

hearing. There is no evidence that anyone made known to the Board the fact that there were alternative recommendations made by the hearing examiner. Plaintiff arrived at the Board meeting 15 minutes after her item had been reached on the calendar. When she had a chance to address the Board, Board Member Dr. Mary Mead expressed surprise that the charges on which they had voted concerned a psychiatric examination and that plaintiff had not yet received a copy of the Trial Examiner's recommendations. Plaintiff was not told how the Board voted except that she would find out by mail. A copy of the Trial Examiner's report was mailed to her on July 23, 1970, with a report of the Board's action.

Later plaintiff was told by David Lubash, her attorney, that the Board of Education would offer her a pension for medical disability provided she signed the neces-

sary papers quickly and agreed not to litigate further in the courts -- a course which she refused to follow. She had told Mr. Goffen that she needed "only a few months" to qualify for disability retirement.

Plaintiff then engaged Marjorie O'Connell as attorney. Miss O'Connell did not institute any action to review the Board determination, but assisted plaintiff in presenting her case to the New York State Division of Human Rights. Plaintiff filed three pro se petitions for review under Article 78, on narrow grounds, all of which were denied. These appear not to have mentioned the Board's failure to give her a copy of the Trial Examiner's report in advance of its consideration by the Board.

Plaintiff also presented her case to the Commission of Human Rights of the City of New York, which took no action. She charges the Corporation Counsel and two of

his staff as parties to the conspiracy against her, but sets forth no facts which indicate discriminatory actions on their part.

A minor mystery which may have some relevance to the case is that Mrs. Buck was still teaching at the Bryant Youth and Adult Center in 1971. Among the affidavits of former students who told of her kind and efficient work with them when she was a guidance counselor, there were two who mentioned also having her as teacher of Gregg stenography in evening classes at Bryant High School in 1971. (The relation between Bryant High School, the Bryant Center, and the Board of Education has not been explained). Shirley Jones, one of those who had been illegally excluded from Franklin K. Lane by Mr. Selub, told of Mrs. Buck's concern for the students and of her willingness to work when the other teachers

and the principal went on strile. She continued her affidavit by stating:

> I can say that from a black student's point of view, Mrs. Buck was the kind of guidance counselor that we like to have in the public schools.

The Goffen-Levien Motions

Mr. Levien and his associate, Mr. Goffen, were retained under a written agreement of September 4, 1968 to get court orders annulling the order for a medical examination of plaintiff. Their services were expressly not to include any appeal. They obtained an order to show cause and a stay, prepared a reply to the City's answer, argued the motion before Mr. Justice Backer, submitted a 15-page memorandum, and filed a notice of appeal. On December 30, 1969, there were requested by Mr. Lubash to turn over their papers to him and did so with a letter dated January 6, 1970. They deny and discrimination or con-

spiracy.

Mr. Levien asserts in his moving papers that plaintiff "is obviously a mentally disturbed woman," that "hers is a typical persecution complex" and that"there is a likelihood, judging by what I know of her personality that she might become hysterical or even violent during the taking of the testimony." Plaintiff asserts in her reply affidavits that the two attorneys took sides with her adversaries, that she had to correct three prejudicaial sentences in their draft of reply in the Article 78 proceeding, that they advised her not to go to work during the strike, and that they advised against her bringing an action.

Mr. Levien does not state when he made the observations which he now says indicate plaintiff's hysterical character. There is no assertion that he saw her after

the petition was argued before Mr. Justice Backer.

There is no indication that Mr. Levien, Mr. Goffen, or the Trial Examiner or any other party gave consideration to the proposition which may be pertinent that:

> If plaintiff was mentally ill, whether her attorney then believed this to be so or not, she may not have been capable of insubordination, in which event she should have been placed on sick leave or disability retirement rather than being dismissed from her position.

Discussion

The memorandum of the City defendants in support of their motion for summary judgment is sketchy and incomplete because it relied on a jurisdictional limitation which has been eliminated since the memorandum was written and on a doctrine of res judicata that is not wholly applicable to the facts.

I. Jurisdiction

The Corporation Counsel relies on

Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1969) and Canty v. Board of Education, 448 F.2d 428 (2d Cir. 1971), vacated 92 S.Ct. 2874 (1972), for the proposition that a civil rights action does not lie for mere loss of a job. These cases were based on the old distinction between personal rights and property rights. The Supreme Court has since ruled that the distinction is invalid and that a civil rights action will lie for loss of property rights. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.C.1111 (1972).

II. Res Judicata

The City relies on the doctrine of res judicata as applied in Taylor v. New York City Transit Authority, 433 F.2d 655 (2d Cir. 1970), which held that federal review of the plaintiff's dismissal from a City civil service job was barred if there had been a review on the merits be-

fore the City Civil Service Commission and the state courts.

Where an issue was raised in a state administrative agency but not in a state court, the rule of res judicata was held inapplicable. James v. Board of Education, 462 F.2d 566 (2d Cir. 1972). The present case is a hybrid type, for plaintiff sought belated court review pro se three times on limited grounds, and did not present her claims of discrimination to the state courts. Her first Article 78 proceeding, filed on May 10, 1971, asked to rule out of consideration her October 15, 1969 failure to report, because it fell on Vietnam Moratorium Day. Her second such proceeding, filed May 27, 1971 asked that the matter of her suspension be restored to the Board of Education calendar. Her third such proceeding, filed June 15, 1971, asked to rule out of consideration her August 27, 1968 fail-

ure to report, because it was a vacation day. All three proceedings were brought more than four months after the Board of Education's dismissal order, and were challenged by the City as untimely. The first and third were denied on the ground that the consideration of the particular notice was not arbitrary, and that the proceeding was barred by the statute of limitations. The second was denied on the ground that the Board had already acted. The claims of discrimination on ethnic or union grounds were not presented to the courts in any of the proceedings.

Since the James case was not reported until after the City submitted its memorandum on these motions, it did not deal in depth with the rule that

> a plaintiff with a claim for relief under the Civil Rights Act, 42 U.S.C. § 1983, is not required to exhaust state remedies.

James v. Board of Education, 461 F.2d at 570.

Plaintiff's obligation to obey the notice to submit to a medical examination was the subject of a full and fair evidentiary hearing before an experienced Trial Examiner and should not be re-examined in a federal court. However, the resolution designating Hon. Daniel Gutman did not require him to determine whether there was a discriminatory background to the suspension without pay, and his report did not deal with all the issues presented to this court.

This case is not like Foppiano v. Lowery, 70-C-5139 (E.D.N.Y. June 1, 1971), aff'd Nov. 3, 1971 (2d Cir.), which the City cites. There a clear question of fact was presented, whether plaintiff was disabled because of an ankle injury or whether he was malingering in order to get a diability pension like his brother's. The matter was squarely presented to the

state court in an Article 78 proceeding. There was no claim of discrimination, merely an insubstantial claim of lack of procedural due process.

Moreover, none of the city cases involve a plaintiff whose mental capacity was under attack. The effect of a misconceived form of state judicial review, if the plaintiff was not capable of a meaningful choice of remedies, has not been briefed. On a motion for summary judgment, the court will not decide the point adversely to the plaintiff. At a later point, the court may have to resolve the question of how to deal with a party who asserts her own complete competence, but whose adversary asserts that she requires a psychiatric examination to determine her competence.

III. The Notices to Submit to Medical Examination.

If an order to undergo a psychiatric examination is in fact issued in retaliation for exercise of an employee's rights, there may be a serious question of violation of federal rights. Leonard v. Sugarman, 466 F.2d 1366 (2d Cir. 1972).

In this case there are a number of issues which were not dealt with in the City defendants' motion papers or in the Statement According to Rule 9(g) attached to the City defendants' notice of motion.

Some of the issues which require further exploration include:

(1) Whether the initial suspension without pay was founded on discrimination because of ethnic background or non-union activities;

(2) Whether consideration was given to the alternative recommendation of the Trial Examiner, and if not, why not;

(3) Whether plaintiff was mentally

competent of insubordination at the time of the acts forming the basis of the charges; and

(4) Whether plaintiff was notified of the text of the Trial Examiner's report and given an opportunity to present argument in opposition to it before the Board.

IV. Cause of Action for Libel

The defamatory remarks of which plaintiff complains may be within the scope of absolute or qualified privelege. Even if there were libellous statements in the report which recommended a medical examination, it may be argued that they were not the cause of plaintiff's dismissal, for she could have submitted to the examination and been found to be in good health.

So far as pendent jurisdiction might permit consideration of a libel claim incident to a civil rights suit, the court would exercise its discretion not to entertain the claim.

V. Discrimination for Anti-Union Activities.

The affidavits create issues of fact as to whether plaintiff's suspension, almost five months before the Trial Examiner determined the charges against her, was influenced by retaliation for her position in the labor disputes between the teachers' union and the Board of Education. The issues concerning the teachers' strike are still creating problems in the New York courts. E.G. People v. Horelick, 30 N.Y. 2d 453, 334 N.Y.S.2d 623 (1972) (4-3 decision).

The right to work is a fundamental right. The right of association is also a basic right, protected by the National Labor Relations Act when interstate commerce is involved.

Dismissal of a public school teacher for membership in a union has been held to

constitute the denial of a federal right protected by the First Amendment and to be actionable under 42 U.S.C § 1983. Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968). New York courts recognize teachers' rights of union membership. Matter of Tischler v. Board of Education, 37 A.D.2d 261, 264, 323 N.Y.S. 2d 508 (2d Dept. 1971).

Freedom must work in both directions. Therefore, a teacher must also have the right to refrain from joining a union, or from participating in a strike called by the union. Cf. New YorkCivil Service Law, §§ 202, 209-a(1).

Harassment because of plaintiff's anti-union activities, if proved, would not excuse her obedience to a valid direction to report for a medical examination. However, if plaintiff can show damages from

harassment by defendants because of her refusal to participate in the teachers' strikes, or a causal connection between this harassment and her loss of employment, she should have a remedy under 42 U.S.C. § 1983 in this court.

VI. Particular Defendants

There is no showing of any acts of discrimination by former Assistant Superintendent Anker, Law Secretary Sousa,Principal Murray Cohn, or any of the personnel of the Medical Director's office (defendants Foy, Braphart, Pool, Fischer, Leibowitz, or Rosenberg). Although Dr. Leibowitz and Dr. Fischer signed notices to report for medical examination, they were acting only on the basis of the request directed to them by Mr. Selub. The general claims of conspiracy among all people of Jewish ancestry are insufficient to create an issue of discrimination on their part. Morgan v. Sylvester, 125 F.Supp. 380

(S.D.N.Y. 1954), aff'd, 220 F.2d 758 (2d Cir.) cert. denied, 350 U.S. 867, 76 S.Ct. 112 (1955); Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964).

There is no showing to callenge the bona fides of Trial Examiner Gutman. On the contrary, he suggested that the Board of Education might give Mrs. Buck another opportunity to report for a medical examination. Moreover, he was acting in a quasi-judicial capacity, and is therefore immune from any civil rights action for damages. McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972). See The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv.L.Rev. 1229, 1238 (1955).

With respect to the other Board of Education personnel, issues of fact are presented as to the effect of anti-WASP, anti-Negro or anti-scab bias in connection with their actions, even if plaintiff was

at fault in not complying with the notices which were sent to her. The Board itself has not given reasons why it chose the harsher of the two alternatives submitted to it by the Trial Examiner. The court has not been supplied with a transcript of the Board of Education meeting at which final action was taken. Normally, an administrative agency should give reasons for its decision. Fein v. Selective Service System, 405 U.S. 365, 380-81, 91 S.Ct. 1062, 1072 (1972); United States ex rel. Checkman v. Laird, F.2d (2d Cir. Oct. 27, 1972), slip sheets 4763, 4744.

As to defendants Levien and Goffen, there are not facts to show any discrimination. Plaintiff chose them as her attorneys, knowing of their race and ancestry. Mr. Levien was a knowledgeable attorney in the field of civil service discipline, and should not be required to answer the gener-

al allegations made against him. Powell v. Workmen's Compensation Board, supra, 327 F.2d 131. Moreover, discrimination by a private attorney is not state action, and therefore is not remediable in a civil rights action. Cf. O'Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972).

To the extent that the complaint may set forth a cause of action for malpractice against defendants Levien and Goffen, the court would not exercise its discretion to retain jurisdiction of the pendant state law claim.

It is ORDERED:

(1) That the motion for summary judgment be granted and the complaint be dismissed as against defendants G. Gary Sousa, Murray Cohn, Evelyn Konigsberg, Charles Foy, Sarah Braphart, Dr. Naomi Pool, Dr. Murry G. Fischer, Dr. Sidney Leibowitz, Dr. Sidney Rosenberg, Theodore H. Lang, and Hon-

orable Daniel Gutman, and also as against the Commission on Human Rights of the City of New York, John Doe, James Doe, and Robert Perez-Wilson, and as against the Corporation Counsel of the City of New York, Edith A. Gordon, and Charles D. Maurer;

(2) That the City defendants' motion for summary judgment be denied in all other respects;

(3) That the motion of the City defendants for a stay of further discovery be denied except that (a) the notice to depose Paula J. Omansky is vacated, and (b) depositions of members and former members of the Board of Education shall continue to be stayed until February 1, 1973, to permit the Board to consider whether to reopen the dismissal proceedings for further or different findings;

(4) That the motion to depose Peter Todaro and Bidabee Gloster be granted; and

(5) That the motions of defendants Goffen and Levien for summary judgment be granted, without prejudice to plaintiff's right to depose them as witnesses on relevant issues and on notice to the Corporation Counsel; and

(6) That the caption of the case be amended to include as defendants only the Board of Education of the City of New York, Bernard E. Donovan, Nathan Brown, Mary Cohen, MortonSelub, Elizabeth C. O'Daly, Jacob Zach, Sheldon Wein, Daisy K. Shaw, and Beverly Lipschitz; and David Lubash and Marjorie O'Connell.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

April 11, 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

Submitted by:

RUTH E. BUCK
Plaintiff Pro Se

Appearance:

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

By: PAULA OMANSKY, ESQ.
Assistant Corporation Counsel
of Counsel

J U D D, J.

MEMORANDUM AND ORDER
(Medical Examination)

The City defendants have moved for an order requiring plaintiff to submit to a medical (psychiatric) examination pursuant to F.R.Civ.P. 35.

This civil rights action is based on plaintiff's discharge by the Board of Education for refusal to submit to a medical and psychiatric examination by the Medical Division of the Board of Education while she was employed as a high school guidance counsellor.

In the course of an opinion denying the motion of certain defendants for summary judgment, the court mentioned that, if plaintiff was mentally ill she may not have been capable of the insubordination of which she was found guilty, in which event she should have been placed on sick leave or disability retirement. There was no evid-

ence that the proceedings before the Board of Education took any consideration of this fact in spite of the nature of the report which led to the request for her to submit to a medical examination.

Plaintiff opposes the examination on the grounds that there is no adequate cause and that her mental condition is not in controversy especially because the action relates to a specific period in 1968-69, now long past.

One of the prayers for relief in the complaint is that plaintiff be reinstated to her former position with the Board of Education. When the trial examiner decided the charge of insuberdination against the plaintiff, he suggested that the Board of Education should consider the advisability of giving her an opportunity to submit to a medical examination before a final decision to discharge her. Since the Board of Edu-

cation, for reasons not disclosed in the record, did not adopt the trial examiner's suggestion, the court has no information concerning her mental capacity to resume the position of guidance counsellor if she is successful in the action.

Discussion

Rule 35 provides:

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician. . . .

The authority to order a medical examination of a plaintiff and to impose sanctions is sustained in Bednar v. Bednar, 441 F.2d 1103 (5th Cir. 1971).

Mental status is in controversy in this case in two respects. The first is plaintiff's capacity to fulfil her duties if reinstated. The second is her ability to understand and handle the litigation in which she is involved.

Directing a city organization to reinstate a person imposes a serious responsibility on the court. The court should not be left in uncertainty and should not await final decision of the action before knowing what remedies may be available. It is not appropriate that any examination be done by the Medical Division of the Board of Education in view of plaintiff's attacks on the Board's procedures.

Plaintiff's mental capacity in relation to the conduct of the law suit is also important so that the court will not be faced with a challenge to any final judgment on the ground that the issues have not been properly presented. Plaintiff has a right to proceed without an attorney, but the court feels the need for medical advice under the special circumstances of this case.

Plaintiff has indicated her willing-

ness to take part in the examination if ordered by the court over her objection and to share in the cost. The defendant Board of Education as the moving party is primarily responsible for the expense if plaintiff does not pay her half.

It is ORDERED (1) that plaintiff submit to a mental examination by Dr. Harley Shands at Roosevelt Hospital, 8th floor, 428 West 59th Street, New York, N.Y. at 1:30 p.m. on April 24, 1973 or such different time as may be agreed by the parties or fixed by the court; (2) that Dr. Shands report to the court and to the parties in writing concerning (a) plaintiff's capacity to understand the nature and effect of the litigation which she has instituted and (b) her capacity to serve as a high school guidance counsellor; (3) that either party may submit to Dr. Shands for consideration copies of any documents filed in this action,

on notice to the other party; and (4) that Dr. Shands' bill for services be rendered to plaintiff and to defendant Board of Education of the City of New York, each to pay half, but that the Board of Education shall pay the full amount with right to reimbursement of half by the plaintiff, if plaintiff does not pay her share within 30 days after submission of the bill.

/s/ ORRIN G. JUDD
U. S. D. J.

BEST COPY AVAILABLE

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

April 11, 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------x

Submitted by:

RUTH E. BUCK
Plaintiff Pro Se

Appearance:

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

By: PAULA OMANSKY, ESQ.
Assistant Corporation Counsel
Of Counsel

J U D D, J.

MEMORANDUM AND ORDER
(Motion for Contempt)

Plaintiff has moved to declare Paula Omansky, Assistant Corporation Counsel, in contempt of court and punish her.

Plaintiff complains of the Assistant Corporation Counsel's failure to attend depositions on February 7, February 14, and March 7, 1973, and of expense of $18. which plaintiff incurred in connection with one of the depositions that did not take place.

Miss Omansky asserts that she was on trial on February 7 and so informed plaintiff in advance, that the witness who was to be deposed on February 7 and again on February 14 was in fact deposed on February 26, and that the witness to be deposed on March 7 was in fact deposed on March 14.

In this civil rights action, the

docketed papers, including numerous notices of deposition, are now up to No. 179. The court has been available to pass on questions relating to discovery, without requiring formal papers or referring them to a United States Magistrate as might be done. The postponement of the March 7th deposition to March 14 was agreed upon in a conference of the parties in chambers on March 5, 1973.

The court would have no power to find Miss Omansky in contempt under F.R. Civ.P. 45(f), as requested, because that relates to the person served with a subpoena and not to the attorney. Sanctions may be applied to an attorney or a party under F.R.Civ.P. 37(b), but that is not appropriate here.

In order to minimize disputes in the future and delays in preparation of transcripts, it is appropriate to direct that discovery of any defendant proceed

first by interrogatories. The court can determine after interrogatories have been answered whether oral depositions are necessary.

It is ORDERED that plaintiff's motion for a finding of contempt be denied, and that no further oral depositions of any defendant proceed until written interrogatories have been submitted and the necessity for oral depositions have been agreed by the defendant or determined by the court.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

January 7, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN, NATHAN BROWN, MARY COHEN, MORTON SELUB, ELIZABETH O'DALY, JACOB ZACH, SHELDON WEIN, DAISY K. SHAW, AND BEVERLY LIPSCHITZ; and DAVID LUBASH and MARJORIE O'CONNELL,

Defendants.
----------x

Docket #71-C-954

Submitted by:

RUTH E. BUCK
Plaintiff, Pro Se

Appearance:

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for Municipal Defendants

By: PAULA J. OMANSKY, ESQ.
Assistant Corporation Counsel
of Counsel.

J U D D, J.

MEMORANDUM AND ORDER

The following motions are pending in this long drawn-out civil rights case.

1. A motion by the Municipal defendants to schedule a hearing on plaintiff's ability to understand and handle the litigation, and to require her to submit to further examination, pursuant to F.R.Civ.P. 35, by Dr. Harley Shands or by another psychiatrist of defendants' choice;

2. A motion by plaintiff for an order compelling the signature and filing of the deposition of Mary Cohen and for an award for expenses in connection with the motion;

3. A motion by the Municipal defendants for a protective order requiring that continued discovery of Mary Cohen by written interrogatories not be had;

4. A motion by plaintiff to find Assistant Corporation Counsel Paula J. Oman-

sky in contempt for failing to respond to interrogatories, and for other relief; and

5. A motion by plaintiff to compel the signature and filing of the deposition of Mary Meade and for expenses in connection with the motion.

Motions 2 and 5 are moot because the depositions were in fact filed on December 7, 1973. The requests for payment of expenses are denied.

Facts

1. The motion for a hearing on plaintiff's mental competence must be considered in light of the extent of the court's powers. The court has already decided in one of the Memoranda and Orders of April 11, 1973 that it has power under F.R.Civ.P. 35 to direct plaintiff to submit to a psychiatric examination, and plaintiff has had one such examination. The court could dismiss the action without prejudice if there

were an order for further examination and plaintiff failed to comply. If a further examination were held and the court determined that plaintiff lacked the competence to conduct the litigation, the next step would be the appointment of a guardian ad litem to conduct the litigation, in the absence of an official committee. Bednar v. Bednar, 441 F.2d 1103 (5th Cir. 1971). There is no indication of any proceeding pending in the state courts to have a committee appointed, and such an application would likely be unsuccessful in the light of Dr. Shands' limited finding of plaintiff's mental defe cts.

Plaintiff's past conduct, however, tends to discourage the court from appointing a guardian ad litem to prosecute the action. Plaintiff's four prior attorneys have all been made defendants in this action.

One of the purposes of the original

mental examination of plaintiff was to determine whether reinstatement to her position with t he Board of Education would be a feasible remedy if she were successful. A trial now of the issue of her mental capacity would relate to one of the issues on the merits of the case. Such a hearing does not constitute an efficient method of obtaining progress in the action.

Dr. Harley Shands is a distinguished psychiatrist, Director of the Department of Psychiatry at the Roosevelt Hospital. He was selected by the court on the recommendation of another non-Jewish psychiatrist in Brooklyn who was not available at the time the prior application was made. Since Dr. Shands submitted his report, he has been excoriated by the plaintiff in papers filed with the court. Arrangements for plaintiff to submit to more detailed examinations by Dr. Shands or by another

psychiatrist would consume the time and efforts of the court without any certainty of beneficial results.

3. With respect to the interrogatories directed to Mary Cohen, the court sustains the objections to interrogatories 11, 12, 14, and 16.

With respect to the interrogatories directed to Elizabeth C. O'Daly, the objections to interrogatories 1, 7, and 9 are sustained, and the others are overruled.

With respect to the interrogatories directed to Daisy Shaw, the objections to Interrogatories 4, 7, and 9 are sustained and the others are overruled.

With respect to the interrogatories directed to Sheldon Wein, the objections to interrogatories 5, 7, 8 and 9 are sustained, and the others are overruled.

4. There is no basis for any finding

that Miss Omansky was in contempt. Plaintiff might have been entitled to a Rule 37 order requiring answers to be completed within thirty days, but it now appears that answers to the interrogatories directed to the Board of Education were filed on December 7, 1973, and the questions relating to the other interrogatories have been disposed of.

No sufficient ground has been shown for oral deposition of any defendants.

Supplemental pleadings at this stage are not appropriate.

Schedule for the Litigation

The time has come to establish a timetable to enable this case to be brought to trial. The issues are essentially simple; whether the orders for plaintiff to submit to a psychiatric examination by Board of Education physicians were triggered by any defendant's alleged prejudice against the plaintiff because she refused to partici-

pate in union activities or because she was a WASP, and if so, whether any damages are recoverable; and whether the Board of Education denied fair consideration to plaintiff and her attorney with respect to the recommendation of the trial examiner that she be given another opportunity to submit to a psychiatric examination before being dismissed.

Since the determination of appropriate relief if plaintiff succeeds may require a determination of plaintiff's mental capacity to perform her task with the Board of Education, it is desirable to have separate trials on the issues of liability and of damages or other relief.

Any further interrogatories or discovery by either party should be initiated within thirty days of the date of this Memorandum and Order and completed within thirty days thereafter.

By April 1, 1974, each party should file a trial memorandum with the court composed of not more than thirty pages and including a statement of undisputed facts, a statement of disputed issues of fact, a list of witnesses and exhibits to be offered, a statement of issues of law, and a list of authorities relied on to support the legal propositions.

Plaintiff would be well advised to seek the assistance of counsel to help focus her memorandum on the essential areas of the case.

It is ORDERED (1) that the motion for a hearing under Rule 35 be denied; (2) that the motion to compel the filing of interrogatories of Mary Cohen and Mary Meade be denied as moot, and the application for expenses be denied; (3) that the motion concerning written interrogatories be disposed of in accordance with the directions set forth above, and that defendants' answers to interrogatories be filed by February 13, 1974; (4) that the motion to find Paula Omansky in contempt and for other relief be denied; and (5) that the parties adhere to the schedule set forth above concerning the completion of discovery and the preparation of trial memoranda.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - ORDER OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF N. Y.

February 26, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------x

Upon application of the plaintiff, this cause being heard on February 8, 1974,

IT IS ORDERED that Mr. Morton Selub appear for deposition upon oral examination at Room 130, United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201 on March 12, 1974 at 10:00 A.M. and that failure to do so may be deemed a contempt of this court.

Dated: Feb. 26, 1974 /s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

February 26, 1974

Docket # 71-C-954

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------x

Appearance:

RUTH E. BUCK
Plaintiff, Pro Se

Submitted by:

DAVID B. LUBASH, ESQ.
Defendant, Pro Se

J U D D, J.

MEMORANDUM AND ORDER

Defendant David B. Lubash has moved to dismiss the complaint for failure to state a

cause of action or by way of summary judgment. According to the complaint, and the supplementary papers in the file, defendant Lubash deserted plaintiff, his client, at the crucial point when Judge Gutman's report was on the Board of Education calendar to consider his suggestion of a further chance to avoid dismissal. See pp. 14-15 of this court's Memorandum and Order dated December 15, 1972. Accordingly, the complaint states at least a valid pendant state law action for malpractice, which is sufficiently related to the civil rights claimsto be tried in the federal court.

It is ORDERED that the motion for summary judgment be denied.

/s/ ORRIN G. JUDD
U. S. D. J.

BEST COPY AVAILABLE

APPENDIX A - MEMORANDUM OF MAGISTRATE MAX SCHIFFMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

March 14, 1974

Docket #71C954

The plaintiff in this action has brought on a series of (5) separate motions for pre-trial depositions and interrogatories.

In addition to the five motions referred to, another motion returnable March 1, 1974 also in reference to interrogatories, was advanced by the undersigned with the consent of the movant and respondent and deemed made returnable with the other five motions, thus making a total of six to be

considered and reported upon in one order.

I, therefore, address myself to each of the motions in turn, which have been for the purpose of this report, consolidated into an omnibus type motion and each segment thereof is numerically designated from "one" to "six" inclusive.

MOTION "ONE" - To Compel Board of Education To Answer Interrogateries

In this motion, plaintiff seeks to compel the defendant, Board of Education to answer interrogatories numbered 48 to 67 inclusive, which plaintiff alleges were not answered. I respectfully recommend the following dispostion of each of said items.

Items 48 to 53 inclusive. The opposition affidavit of Paula J. Omansky, Attorney for the Board of Education, sworn to February 21, 1974, states that the Board of Education has no knowledge of the facts sought to be elicited in these items. I

respectfully submit that this statement be deemed to be the answer to said questions, without further response thereto.

The remaining items, 54 through 67, are irrelevant, tangential, cumulative material, which have no bearing on the issues involved in the litigation and should be denied.

MOTION "TWO" - To Compel Signature of Todaro Deposition

Motion to Compel Signature of Todaro Deposition and file same in its present form, should be denied. The defendant's attorney has conceded that the only items requiring any change are items which plaintiff has designated on the transcription of the tape as "inaudible".

Furthermore, the recollection of the deposed party as to a disputed answer must control in this situation, because by plaintiff's admission, the tape is "inaudible."

As to this motion, I respectfully recommend that it be denied and the movant be directed to accept the Todaro deposition as corrected and executed.

MOTION "THREE" - For Order Requiring Abraham Gordon to Be Deposed

I respectfully recommend that this motion for an oral deposition of Abraham Gordon be denied. This Court has attempted to end the constant barrage of paperwork and motions in this case by setting a timetable for an end to pre-trial proceedings. The Court by Order dated January 7, 1974, has directed that on or before April 1, 1974, both sides are to submit a trial memorandum "composed of not more than thirty pages and including a statement of undisputed facts, a statement of disputed facts, a list of witnesses and exhibits to be offered, a statement of issues of law, and a list of authorities relied on to support the legal propositions."

The material sought to be obtained from Mr. Gordon is tangential and irrelevant. The Court in its Order of January 7, 1974 brought the whole action into crystal clear focus by stating "The issues are essentially simple: whether the orders for plaintiff to submit to a psychiatric examination by Board of Education physicians were triggered by any defendant's alleged prejudice against the plaintiff because she was a WASP, and if so, whether any damages are recoverable; and whether the Board of Education denied fair consideration to plaintiff and her attorney with respect to the recommendation of the trial examiner that she be given another opportunity to submit to a psychiatric examination before being dismissed.

Since the determination of appropriate relief if plaintiff succeeds may require a determination of plaintiff's mental capaci-

ty to perform her task with the Board of Education, it is desirable to have separate trials on the issues of liability and of damages or other relief.

Any further interrogatories or discovery by either party should be initiated within thirty days thereafter."

Despite the clear mandate of the Court, plaintiff has persisted in discovery, to the point where she can now ask for more time. Examination of the file indicates that this is the next step in this long, drawn-out, time-consuming action.

All of this flies in the face of Rule 26 (c) of the Rules of Civil Procedure. No one seeks to deny the plaintiff her day in Court. However, in the process she should not be permitted to annoy, harass, or oppress a defendant, be it the Board of Education or "John Doe".

MOTION "FOUR" - To Change Deposition Procedure

This motion seeks a direction changing deposition procedure. This request for relief is completely improper. To put it succinctly, plaintiff would restructure the rules of this Court to suit her work habits and personal concepts of how her case should be handled.

The request has no basis in law.

I respectfully recommend that the motion be denied.

MOTION "FIVE" - To Compel Production of Papers.

While the plaintiff has thrown on the table a potpourri of items, nevertheless, from this mass of irrelevant and non-material matter, it appears that the Board of Education should be compelled to produce photostatic copies of the Collective Bargaining Agreements between it and the United Federation of Teachers for the years 1964 to 1969 inclusive. If there are in existence, agreements affected for a simi-

lar period between the Board of Education and the association, which plaintiff claims represented the Guidance Counselors, then photostatic copies of said agreements should likewise be produced. As to these items, there are arguments that can be adduced for consideration as to materiality.

As to the balance of the requests, the undersigned respectfully recommends that same be denied for the following reasons:

1. The requests are clearly in the nature of a blatant "fishing expedition."

2. No good reason is advanced for making such requests on the eve of trial.

3. This case has been thoroughly litigated by the plaintiff. All parties concerned with this action have been manipulated by the plaintiff and the processes of the Court have been abused by her. I respectfully submit that in the interest of justice and fair utilization of its tools, that an end be put to this constant barrage of paperwork which constitutes abuse of process by way of a protective order limiting the plaintiff to such discovery which

she already has had and which the Court has ordered.

MOTION "SIX" - To Shorten Time for Answering Interrogatories

In view of the recommendation contained herein with reference to Motion "Five" and for the reasons set forth therein, it is respectfully recommended that the motion be denied.

Dated: Brooklyn, New York
March 14, 1974

/s/ Max Schiffman
MAX SCHIFFMAN
United States Magistrate
Eastern District of
New York.

APPENDIX A - MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

December 2, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN, NATHAN BROWN, IRVING ANKER, MARY COHEN, MORTON SELUB, ELIZABETH O'DALY, JACOB ZACH, SHELDON WEIN, DAISY K. SHAW, BEVERLY LIPSCHITZ, DAVID LUBASH, and MARJORIE O'CONNELL,

Defendants.
----------x

Appearances:

RUTH E. BUCK
Plaintiff, Pro Se

HON. ADRIAN P. BURKE
Corporation Counsel, City of New York
Attorney for Municipal Defendants

By: PAULA J. OMANSKY, Esq.
GAYLE REDFORD, Esq.
Assistant Corporation Counsel
of Counsel

DAVID LUBASH, Esq., Pro Se

J U D D, J.

MEMORANDUM OF DECISION

In this civil rights action by a high school guidance counselor challenging her dismissal by the Board of Education, the court has completed hearings on the merits.

Introductory Background

The record includes five large folders of pleadings, affidavits, and depositions, as well as more than eighty-five exhibits offered in the course of plaintiff's presentation of her own evidence and cross-examination of defense witnesses.

The case began with over fifty defendants. The preparation for trial and the ultimate hearing were delayed while the court dealt with motions to dismiss, which resulted in eliminating six of the eight original groups of defendants described in this court's Memorandum and Order dated February 10, 1972, and some members of the

two remaining groups. Thus far, the Court has been called upon to write eleven memorandas in the case, in addition to a report from one of the Magistrates concerning supervision of discovery proceedings.

Plaintiff's depositions of defendants and other witnesses were taken by tape recorded by the court's permission. Her delays in transcribing the depositions contributed to the delay in trial.

The present defendants are the New York City Board of Education, three former Superintendents of Schools (Bernard E. Donovan, Nathan Brown and Irving Anker), plaintiff's high school principal (Morton Selub), six of plaintiff's supervisers at various levels, (Mary Cohen, Beverly Lipschitz, Elizabeth O'Daly, Daisy K. Shaw, Sheldon Wein and Jacob Zach), and two of her former attorneys (David Lubash and Marjorie O'Connell.)

The complaint seeks reinstatement to plaintiff's former position with back pay. Against the individual defendants other than Mr. Lubash and Miss O'Connell, the complaint asks for costs payable to the plaintiff and punitive damages payable to the City of New York (which does not support that request). Against Mr. Lubash and Miss O'Connell, lawyers retained by plaintiff, the complaint asks for a refund of legal fees which were paid to them.

The specific issues for trial as set forth in this Court's Memorandum and Order of January 7, 1974, were (1) whether the orders for plaintiff to submit to a medical (psychiatric) examination by Board of Education physicians were triggered by any defendant's alleged prejudice against the plaintiff because she refused to participate in union activities or because she was a white Anglo-Saxon Protestant (WASP)

and (2) whether the Board of Education denied fair consideration to plaintiff and her attorney with respect to the suggestion of the Trial Examiner that she be given another opportunity to submit to a medical examination before being dismissed. Assertions of libel in the complaint were not set for trial, because libel is a state cause of action, which the court did not wish to treat as a pendent issue, and on which the defense of privilege might exist.

Prior to the trial, the court added two essentially legal issues; (3) whether plaintiff was denied due process by the action of the municipal defendants in reaching a final decision before providing her with a copy of the Trial Examiner's report; and (4) whether there was an obligation on the municipal defendants to determine that plaintiff was mentally competent of insubordination before acting on the

recommendation of dismissal.

Facts

The case arose basically from a letter written by Morton Selub, Principal of Franklin K. Lane High School, Brooklyn, on June 21, 1968, to the Medical Director of the Board of Education, requesting that plaintiff, a guidance counselor in the school, be given a medical examination, and attaching a statement of reasons. The reasons, as summarized in this court's Memorandum and Order of December 15, 1972 (p. 9-10), related to incidents of allegedly strange behavior, some observed by Mr. Selub, and some reported by defendants Mary Cohen and Sheldon Wein. The reasons included assertions that plaintiff had not followed the instructions of Mrs. Cohen, one of the assistant principals, and had written frequent notes, letters or memos and made telephone calls where personal

contact would have been more effective.

Plaintiff did not appear on the original date fixed for her medical examination or on any of four later dates (not including one for which the notice was returned for insufficient postage), giving a variety of excuses. She had attacked the order for a medical examination by an Article 78 proceeding which was dismissed by Mr. Justice Backer on May 21, 1969, before the third notice of examination. Although she reported to the Medical Office on November 6, 1969, she refused to sign in until she had seen a supervisor. She left after waiting a half hour in vain for the supervisor, because she considered that her working hours were over at 3 o'clock. The steps between Mr. Selub's original letter and plaintiff's suspension are described in this court's Memorandum and Order of December 15, 1972 (pp. 10-13).

On the basis of her refusals to appear for medical examination, plaintiff was suspended without pay on December 5, 1969, and charged with insubordination and violations of the Board of Education By-laws concerning medical examinations. She was restored to the payroll in March 1970, because of the 90-day limit on the continuance of a suspension without pay. She was then assigned temporarily to the Bureau of Libraries pending disposition of the case, but refused to report there.

BOARD OF EDUCATION PROCEEDINGS

After full hearings before Judge Daniel Gutman as Trial Examiner, he sustained the charge of insubordination, in a report dated April 22, 1970 but suggested that, in view of plaintiff's years of good service,

> . . . The Board of Education consider the advisability of giving respondent an opportunity to submit to a medical examination, pending the final determination of this proceeding.

Plaintiff was notified by letter dated July 17, 1970 that the matter would be on the Board of Education calendar on July 22, 1970, and that a copy of the Trial Examiner's report would be sent to her after the Board of Education acted. The letter did not say that she could be heard. Her then attorney, David Lubash, told her not to go, saying, "Don't worry; they won't dismiss you." Plaintiff nevertheless attended the Board meeting, but got there fifteen minutes late. The room was full, with about 250 people in the audience. Plaintiff was told on the second call that the Board had already voted (her case was No. 60a) and that she would get a copy of their vote. She was not even told how the Board had voted.

Miss Mary Meade, a Board member, stated in a deposition that she was specifically assigned to plaintff's case, and received Judge Gutman's report in May, 1970. There were five Board members at the time, and one was given the responsibility to read the material on a particular case. She examined the Trial Examiner's report and discussed the matter with the other Board members. When shown the transcript before the Trial Examiner, she said: "I didn't see the whole thing . . .

> "I probably wouldn't have bothered going through it and reading it if I did. After all, as I say, we have paid lawyers to do this".

At another point she told plaintiff:

> "You mean you went to the examination and brought a tape recorded with you?"

* * *

> "Boy! Well, I don't have to read it all."

The underlined words were added to the typed transcript (SM 100), apparently inserted in Miss Meade's handwriting before she signed it.

She testified that the Board made its decision at one of the informal meetings which are held two or three times a week. They simply voted formally on it at the monthly public meeting. No minutes are kept of the informal meetings. Miss Meade said that under the Board rules a resolution is not sent out until it has been voted on, and the Trial Examiner's report is sent with the resolution. Miss Meade had once been a principal.

The only testimony in the deposition of Miss Meade about discrimination was:

> We took Civil Service Examinations and passed them and that's what's going to happen with the Blacks and Puerto Ricans, if they ever get back to Civil Service.

The court, on the municipal defendants' motion, had vacated notices of deposition of other Board members. None of them was called by the defendants.

The defendants assert in their post-

trial memorandum (pp. 25-26):

> Providing plaintiff with a copy of the report prior to the public hearing would have given her no notice that she did not already have. Mrs. Buck clearly knew the contents of the report even without having received a copy of it, and was well aware of the charges against her.

No explanation is given of how plaintiff is supposed to have known the contents of a report which had not been disclosed to her. Her affidavit of May 7, 1974 states that she had no idea what the report contained and no idea that she was actually being dismissed. Nothing to the contrary was developed at the hearing before the court.

Mr. Lubash wrote to the Board on July 27, 1970, after receiving the report, and pointed out that plaintiff had not been given a new opportunity to submit to a medical examination as had been recommended by the Trial Examiner, and that she was now ready to submit.

Mr. Lubash informed plaintiff on August 13, 1970 that he had received a telephone call from Murray Bergtraum whom he described as Secretary of the Board of Education, and that he offered plaintiff a medical disability retirement, but stated that she must make up her mind right away. Believing that Mr. Lubash was asking her to co-operate in another illegal act, she refused the offer.

Thereafter, plaintiff retained Marjorie O'Connell, paying her a fee of $350. Miss O'Connell was named as a defendant in the action, and served with a summons, but did not answer the complaint. She has disregarded subpoenas directing her appearance at examinations before trial, and has not shown what work, if any, she did for the plaintiff.

Plaintiff brought three unsuccessful pre se petitions for review of the Board's

action under Article 78, on narrow grounds. One attacked the consideration of her failure to report on October 15, 1969 for a medical examination because that was Vietnam Moratorium Day, and school attendance was voluntary. The answers to interrogatories show that 157 professional staff members at Lane were absent that day. Another 78 proceeding cited the fact that she was still on the City payroll as an evening teacher at the Bryant Youth and Adult Center, and asked that the Board terminate her suspension and either restore her to the payroll or discharge her, as a prelude to further litigation. The third sought to exclude from consideration the August 27, 1968 failure to report, because it was a vacation day.

A certificate of plaintiff's termination of service as of December 5, 1969 was mailed to her by the Bureau of Teachers

Records, apparently dated May 24, 1971.

Plaintiff's Claims of Discrimination and Harassment

The primary thrust of plaintiff's action is that the direction to report for a medical examination was the culmination of a campaign of harassment by members of the United Federation of Teachers and by Jewish administrators in the Board of Education, after she had refused to participate in the brief teachers strike in September 1967 and in the longer teachers' strike from September to November 1968. Both strikes were related to tensions in Ocean Hill-Brownsville, District 19 under the Board of Education's decentralization plan. The district was largely black, while the teachers were 95% white, and most lived outside the district. Rhody McCoy was the District Superintendent in 1968, and a subject of controversy between the teachers and the local community.

During the 1968 strike Mr. Selub stood in plaintiff's way when she attempted to enter the school. He told her that he had closed the school, an act which she considered unauthorized.

There was some evidence that tensions between blacks and Jews were exacerbated by the strikes, and that there had been anti-Protestant remarks at meetings by Board of Education staff. Plaintiff provided testimony and affidavits from black and Jewish witnesses to show that she was a good counselor and that she had no racial or religious prejudice. She had received satisfactory service ratings consistently until June, 1968 and received some commendations even after that date. No non-striker was punished, and there were no complaints by any of them except Mrs. Buck against any of those who went on strike or against their supervisors. Some non-strikers, and

some blacks and Protestants, were recommended for promotion by Mrs. Cohen after the strikes.

During the early spring of 1968, the plaintiff complained of a letter in her file in which Mrs. Cohen criticized her relations with her colleagues. After a grievance was filed, Mr. Selub directed that the letter be removed from plaintiff's personnel file.

There was considerable testimony concerning plaintiff's case-load, which she thought was unfairly heavy. In September, 1969 Mrs. Cohen offered her an opportunity to supervise the "College-bound" program, a post which would have resulted in a reduction of case-load, but plaintiff refused.

There was testimony from several witnesses concerning difficulties in supervising the plaintiff and peculiarities in her actions. She raised a major storm in the

high school about the fact that she was not supplied with a desk calendar to keep track of her appointments -- a deficiency in school supplies from which other guidance counselors suffered equally. Mr. Selub testified to his personal observation of plaintiff's peculiar behavior and Mrs. Cohen testified to the difficulties in supervising plaintiff and her poor response to referrals by others in the guidance area.

Mrs. Cohen testified before the Trial Examiner that

> When I gave her instructions which were not followed, when I followed up and then pointed out a lack of action, instead of in fact taking action, she proceeded to a polemic of gigantic proportions in which she accused me of inappropriate behavior.

Dr. Lipschitz, the District-Supervisor of Guidance, considered plaintiff to be one of those who needed more than the usual help, and said that she had resorted excessively to memoranda and letters instead of

verbal communication.

With respect to the parts played by the other individual defendants, Sheldon Wein was an Assistant Dean of Boys, whose comments were referred to by Mr. Selub when he recommended a medical examination. Dr. Jacob Zach was the Assistant Superintendent for high schools, who ordered the examination on the basis of Mr. Selub's letter. Daisy Shaw was an Assistant Superintendent for Guidance, whom plaintiff criticized for applauding a speaker who said, at a conference of a thousand guidance counselors in 1965, that "WASPS have done much damage to our county" and "The day of the WASP is over". Mary Cohen is alleged to have conspired with Daisy Shaw to transfer plaintiff to other duties because of her national and religious background.

Elizabeth O'Daly had written a critical letter to plaintiff in 1968 because

plaintiff had communicated directly with the Commissioner of Education and by-passed the New York City hierarchy.

After hearing the witnesses and reading the [illegible] exhibits, the court is satisfied that there was no anti-WASP or pro-union bias involved in the request that plaintiff be given a medical examination.

No evidence was offered by plaintiff to show that the taking of a medical examination would cause her any hardship. Her unspoken reasons for not appearing may well have been her knowledge that many of the medical examiners were in her words, "descended from Abraham through Isaac," and that she feared that she would not get an objective evaluation.

Specific findings are not necessary on the many other incidents which plaintiff mentions in her testimony and papers.

The court curtailed plaintiff's cross-

examination of defense witnesses when she seemed to have strayed on to irrelevant areas, but invited her to submit an offer of proof of any additional facts that she believed might have been developed during further cross-examination or through depositions of other witnesses. Her post-trial summation did not include any substantial relevant matters which are not already part of the voluminous record.

Mental Competence

In late 1973 the municipal defendants moved for a hearing on plaintiff's ability to understand and handle the litigation and for an order requiring her to submit to examination by a psychiatrist pursuant to F.R. Civ.P. 35. Plaintiff originally did not contest the entry of such an order, and agreed to pay half the cost of the examination.

As set forth in this court's Memoran-

dum of January 7, 1974, a non-Jewish, court-appointed psychiatrist reported that plaintiff suffered from a thought disorder, which he described as a "paranoid state", and that she was "clearly psychotic". Plaintiff submitted a psychiatric report by another doctor, who said that she was under pressure in pursuing the legal matter, but that there was no room for a "psychotic" diagnosis. The court did not hold any hearing on the subject in advance of trial because it would relate to an issue involved in the merits of the case and would not be "an efficient method of obtaining progress in the action." See Memorandum and Order dated January 7, 1974.

Mr. Selub told the court that his first doubts of the plaintiff's mental capacity arose in the early spring of 1968 and that he had serious doubts on

the subject by September 1968, which had not been reduced by July of 1970.

Mark Levien, an experienced civil service lawyer who represented plaintiff from September 4, 1968 to December 30, 1969, described plaintiff in an affidavit in this action as "obviously a mentally disturbed woman" with a "typical persecution complex."

The nature of this litigation, in which almost everyone who had been in contact with the plaintiff in connection with the proposed medical examination was made a defendant, and in which shot-gun charges of conspiracy were made against numerous Jewish defendants and a few non-Jews, has a bearing in itself on the question whether the request for a medical examination was improperly motivated.

No evidence was offered by either side with respect to the medical question of

plaintiff's mental competence in 1970 or during the latter months of 1969, when she failed to report for her medical examination.

Although the hearings before Judge Gutman related only to the formal charge of insubordination, the evidence led him to deal with plaintiff's actions in terms of personal traits and refer to her as "intransigent", "dictatorial", and indulging in "whims" and "foibles".

Other Defendants

Although plaintiff accused David Lubash of conspiracy against her interests, she submitted no competent evidence on that point. The $750 fee which he received is within the lower range of reasonable compensation for his services, in taking part in three hearings before Judge Gutman. The court is not required to pass on the wisdom of his strategy.

Dr. Bernard E. Donovan used to be

Superintendent of Schools before June 1969. Dr. Nathan Brown was Acting Superintendent of Schools at the time of plaintiff's suspension but not at the time of her dismissal. Dr. Irving Anker, who was Acting Superintendent of Schools at the time of the Board's discharge of plaintiff, was not dismissed from the action by this court's Memorandum and Order of December 15, 1972, but was omitted from the amended caption, apparently by inadvertence. However, plaintiff produced no evidence that Dr. Anker was responsible for the Board's action in voting plaintiff's dismissal without letting her have a copy of the Trial Examiner's report.

Discussion

If the order to undergo a medical examination was issued in retaliation for plaintiff's exercise of her rights as a citizen, she might show a violation of 42 U.S.

§ 1983. Leonard v. Sugarman, 466 F.2d 1366 (2d Cir. 1972). Plaintiff has the burden of proof with respect to the issue of discrimination, - either on the basis of her religion and ancestry or on the basis of her failure to support the union. She has failed to meet the burden of proof.

She asserts also that she was harassed because of filing grievances against her supervisors. The court finds no evidence that the direction for a medical examination represented retaliation for such complaints.

Plaintiff asserts that legal precedent prevents dismissal of a tenured teacher for mere failure to report for a medical examination. Application of Board of Education, 261 App. Div. 1115, 27 N.Y.S. 404 (1st Dept. 1941). In that case the court sustained a ruling by the Commissioner of Education that a teacher could not be dismissed for

failing to submit to a physical examination by Board of Education doctors. That decision is not controlling here because: first, it relates only to a question of state law and not to the deprivation of federal rights; second, the teacher there consented to physcial examination by a doctor of her own choice; and third, it does not appear that the present by-law provisions were in effect thirty years ago when the case was decided.

Due Process

Since plaintiff was a tenured guidance counselor, she was entitled to a hearing, with due process of law, before her property right in her position could be terminated. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972). Another pertinent case is Snead v. Department of Social Services, 355 F.Supp.

764 (S.D.N.Y. 1973), where a three-judge court held that § 72 of the New York Civil Service Law was unconstitutional and stated (p. 771) that a finding of mental illness severly diminishes a person's "freedom to take advantage of other employment opportunities". That case related only to an involuntary leave of absence for one year on the grounds of mental unfitness. Here, where dismissal was involved, Judge Weinfeld's statement, 355 F.Supp. at 773, is particularly pertinent:

> Regardless of the motivations of the civil service employer, the procedural protections guaranteed by the due process clause are necessary to assure the accuracy and fairness of the ultimate decision concerning mental fitness and to give the individual assurance that he has been fairly treated.

Due process of law should extent not only to the hearing but to the decision. It is an unreal protection to deprive an employee of participation at the crucial point where the decision whether to fire

or not to fire is made.

It might be argued, in respect of Miss Meade's testimony, that due process does not require that every judge of an appellate court read the entire record. But that would not be an apt analogy. The procedure of the Board of Education is more like a court appointing a special master, announcing a date on which the special master's report will be confirmed, and withholding the report from one party until after the court had acted on it. Cf. F.R.Civ. P. 53 (e) (1), (2).

The scope of due process includes the right to respond to a recommended decision before the final finding is made. It has been held in Selective Service matters that a person should have the "right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be

countered." Rohe v. Froehlke, 500 F.2d 113, 116 (2d Cir. 1974), quoting Gonzales v. United States, 348 U.S. 407, 415, 75 S.Ct. 409, 414 (1955).

The New York Court of Appeals has recognized that a claimant should be given an opportunity to controvert the conclusions in reports before the body which has the final power of decision. Matter of Balash v. New York City Employees' Retirement System, 34 N.Y.2d 654, 355 N.Y.S. 2d 577 (1974), citing Matter of Newbrand v. City of Yonkers, 285 N.Y. 164, 179 N.E. 2d 75, 82 (1941).

Defendants properly point out that a Federal court should not substitute its judgment for that of a duly empowered administrative agency. Aquayo v. Richardson, 433 F.2d 1090 (2d Cir. 1973); National Association of Motor Bus Owners v. Federal Communications Commission, 460 F.2d 561 (2d Cir. 1972); Retail, Wholesale and De-

partment Store Union AFL-CIO v. National Labor Relations Board, 466 F.2d 380 (D.C. Cir. 1972). The question is not, however, the discretion of the Board of Education in determining the outcome, but the procedure of the Board in deciding a contested matter without affording the plaintiff a proper hearing.

Since Judge Gutman's recommendation for dismissal was on the first page of the report, and his suggestion to permit another opportunity for a medical examination before taking final action was on page 13 and 14, it is not clear whether it was considered by the four Board members who relied on Miss Meade to read the material. Plaintiff had a right even to argue to the Board that Judge Gutman was wrong in finding that there was no justification for all or some of her refusals to report, or in recommending dismissal as a sanction. As

the Supreme Court ruled in dismissing an early Article 78 proceeding, "it is the Board's action . . . which constitutes the 'final determination'". Matter of Buck v. Brown, 11086/69, Sup.Ct. Queens Co., (March 20, 1970).

Defendants rely on Kursch v. Board of Education 7 A.D. 2d 922, 183 N.Y.S. 698 (2d Dept. 1959), as supporting the concept that the public meeting is merely formal. The Kursch case, however, dealt only with the right to discuss matters in executive session, not with the right to dispense with all opportunity for a litigant to know the subject matter of the discussion, or to see a contested report before it was adopted by the Board.

Where only one member of the Board reads the Trial Examiner's report, and she does not read the transcript, as appears to be the case here, a person who faces dismissal should have a right to see the re-

port beforehand and argue with respect to the action to be taken on it.

Plaintiff's pro se efforts to upset the Board of Education decision do not prevent relief in the federal court, since a claim for relief under 42 U.S.C. §1983 does not have to be preceded by an exhaustion of state remedies. James v. Board of Education, 461 F.2d 566 (2d Cir. 1972).

Plaintiff's right to back pay should run only from the date of the Board's action, leaving the question of pay during the period of temporary suspension to await the final disposition of the proceeding before the Board.

Mental Competence

In any further proceeding, the Board of Education may wish to address itself to the issue of plaintiff's mental competence. There is some incongruity in charging a person with refusal to submit to an examination on mental competence and then dis-

missing her for insubordination, without determining whether she was mentally competent or whether she knowingly and intelligently waived the right to have a determination of competence. Cf. Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 841 (1966); People v. Silver, 33 N.Y.2d 475, 354 N.Y.S. 2d 915 (1974); People v. Cisneros, A.D. 2d N.Y.L.J. Nov. 9, 1974 (1st Dept. October 22, 1974).

If plaintiff had exercised her right to appeal to the Commissioner of Education, as she may do after any new determination, he might have required a finding on competence. In Matter of Edward Burns, 12 Educ. Dept. Rep. 111, 112 (1972) the Commissioner dealt with another guidance counselor whose position in an upstate school district had been abolished after he failed to appear for a medical examination. The Commissioner said,

> Notwithstanding the apparent willingness of both parties to forget the issue of petitioner's competence, that issue is paramount and remains to be resolved.

Defendants assert that there is a difference between mental competence and professional competence. But the dividing line is not a precise one, as indicated by Mr. Bergtraum's 1970 offer of a disability retirement and the defendant's 1972 request for a determination of mental competence under F.R.Civ.P. 35.

It is ORDERED:

1. That the caption be amended as shown on the first page hereof.

2. That the action of the Board of Education in dismissing plaintiff be vacated, without prejudice to further proceedings in which she shall have an opportunity to be heard concerning the Trial Examiner's report;

3. That judgment be entered in plaintiff's favor against the Board of Education of the City of New York for salary not received from July 22, 1970 to date, less plaintiff's intermediate earnings, to be determined on the basis of affidavits unless either party informs the court that a hearing is necessary;

4. That the complaint be dismissed as against defendants Bernard E. Donovan, Nathan Brown, Irving Anker, Mary Cohen, Morton Selub, Elizabeth O'Daly, Jacob Zach, Sheldon Wein, Daisy K. Shaw, Beverly Lipschitz, and David Lubash; and

5. That plaintiff have judgment against defendant Marjorie O'Connell in the sum of $350, with interest fromAugust 1, 1970 and $100 costs for said defendant's disregard of subpoenas.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM OF THE UNITED UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

January 16, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RUTH E. BUCK,

Plaintiff

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

Appearances:

RUTH E. BUCK
Plaintiff, pro se

HON. ADRIAN P. BURKE
Corporation Counsel, City of New York
Attorney for City Defendants

By: GAYLE S. REDFORD, ESQ.
Assistant Corporation Counsel
of Counsel

J U D D, J.

M E M O R A N D U M

This court's Memorandum of Decision dated December 2, 1974 has been met by three

motions, one by the City defendants to alter or amend it, a second by the City defendants to vacate it and set it aside, and a third by the plaintiff to alter or amend it and to hold Sections 2573 (7), (8) of the New York Education Law unconstitutional.

1. The City defendants' first motion is predicated on the assertion that the transcript which Board member Meade did not read before voting for dismissal was the transcript of Mrs. Buck's tape recording at the time of her November 6, 1970 visit to the medical examiner's office and not the transcript of the hearings before Judge Gutman, the Trial Examiner.

This court's interpretation of the Meade deposition appears to have been wrong. The question whether Miss Meade read the trial transcript or not, however, is peripheral to the issue of plaintiff's right

to see the trial examiner's report before the Board of Education acted on it.

In the light of the quotations set forth in defendants' memorandum, the Memorandum of Decision dated December 2, 1974 should be amended by changing page 7, lines 20-22, to read:

> When shown the transcript of the occurrences at the Medical Examiner's office on November 6, 1970, she said,
>
> "I didn't see the whole thing..."

And the first sentence of the first full paragraph on page 21 of the Memorandum of Decision should be amended to read:

> Where a tenured employee is faced with dismissal, and a trial examiner's report concerning a formal hearing and the transcript of testimony have been read by one Board member and discussed by her with other Board members in private, the person who faces dismissal should have a right to see the report before the Board acts on it and to argue with respect to the action to be taken on it.

2. The City defendants' second motion is based on the argument that plaintiff had no right to see the trial examiner's report

before the Board of Education acted on it.

Main reliance is placed on Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973), where the court ruled that failure to provide an Army reservist with a copy of the report of his commanding officer did not violate due process. In the Nurnberg case, however, the commanding officer's report was based on the report of the investigating officer, who had also recommended denial, and the investigating officer's report had been supplied to the plaintiff. See 389 F.2d at 848.

The Corporation Counsel further argues that the plaintiff must have known all the facts in the trial examiner's report, because there was no evidence considered by the Board of Education which had not been produced before the trial examiner. This is a non sequitur. The recommendation of

the trial examiner and his evaluation of the evidence were the significant matters. Plaintiff should have been given an opportunity to attack the evaluation, as well as to argue concerning the suggestion of a final opportunity for a medical examination. The court cannot conclude that she would have rejected this suggestion, if the report had been available to her before the Board acted.

Moreover, it appears that the Board violated its own By-Laws, for the Corporation Counsel quotes a provision of Section 107(7) of the By-Laws that:

> The report of any such trial committee or trial examiner shall be subject to final action by the Board of Education, each member of which shall, before voting, review the testimony and acquaint himself with the evidence in the case.

Miss Meade's deposition indicates that she was assigned to read the evidence on behalf of the entire Board and that no one else

read the transcript. At one point, when asked whether any other Board members read the material in the plaintiff's file, Miss Meade said, "I wouldn't know except that every member was briefed on the case." (Transcript at 14). However, she elsewhere said that others "wanted to look it over" (Transcript at 52), that "it's passed around" (Transcript at 13), and that "some of them looked it over" (Transcript at 104). This implies an exceedingly casual review. More than that, her deposition indicates that matters are not set down for public hearing until a majority of the Board has come to a conclusion on how to vote. The Corporation Counsel's argument that this is the procedure adopted by many city administrative agencies is no justification for making the public hearing a pure formality.

3. Plaintiff's motion asks the court to direct the payment of compensation during the period of temporary suspension. The

Memorandum of Decision of December 2, 1974 left this question for consideration after the final disposition of the proceeding befor the Board. No convincing reason is given for changing this ruling.

A declaration of unconstitutionality of New York Educatimn Law § 2573(7),(8) is not necessary for the purpose of a decision already made, and would require the convening of a three-judge court, which is an unnecessary step at this time.

The court had contemplated prompt determination of the amount of back pay, but the plaintiff's unwillingness to disclose her income tax returns with respect to intermediate earnings has prevented such action. Therefore, the court certifies, pursuant to 28 U.S.C. § 1292(b), that the order contained herein will affect the ultimate outcome of the litigation and should be immediately appealable.

It is ORDERED that the City defendants' first motion be granted to the extent of amending this court's Memorandum of Decision dated December 2, 1974 in the manner set forth above, and denied in all other respects, and that the City defendants' second motion and plaintiff's cross-motion be denied.

/s/ ORRIN G. JUDD
U. S. D. J.

APPENDIX A - MEMORANDUM, DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

July 16, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

RUTH E. BUCK,

Plaintiff

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant
----------x

Appearances:

RUTH E. BUCK
Plaintiff, Pro Se

HON. W. BERNARD RICHLAND
Corporation Counsel of the City
of New York
Attorney for Defendant

By: GAYLE S. REDFORD, ESQ.
Assistant Corporation Counsel
of Counsel

J U D D, J.

MEMORANDUM, DECISION AND ORDER

This court's Memorandum of Decision dated December 2, 1974 directed that the action of the New York City Board of Education in dismissing plaintiff be vacated, without prejudice to proper further proceedings, and that judgment be entered against the Board of Education for salary not received by plaintiff from July 22, 1970 to date, less plaintiff's intermediate earnings. Amendments were made to the Memorandum of Decision in this court's Memorandum dated January 16, 1975, which also denied motions by the City and the plaintiff.

The court has now heard evidence with respect to Mrs. Buck's earnings, and also has received a second motion by the Board to vacate and set aside the order awarding judgment against it for back salary.

Facts

The complaint was based on allegations of discrimination against plaintiff because of her religion and national origin and because of her unwillingness to join a teacher's union. The complaint was based primarily on interference with civil rights under 42 U.S.C. § 1983 and 42 U.S.C. §1985, but it also charged that the defendants had "fraudulently denied petitioner due process". The action was brought pro se and without the assistance of counsel.

The court found that defendants had denied the plaintiff due process in not permitting her to know the terms of the trial examiner's report and recommendation before the Board acted on the report and dismissed her from her tenured position. The Board's action appeared to represent the usual course of procedure in disciplinary matters, and not anything peculiar to plaintiff's case.

Back Pay

Plaintiff submitted a sworn statement of the amount she would have earned at the annual salaries payable to guidance counselors from July 22, 1970 to December 2, 1974, together with amounts she would have earned at Bryant Youth and Adult Center. The total amount was $82,655.84. The only earnings she reported during that period were for services on a New York City Election Board in the amount of $435.50.

At the court hearing she also claimed approximately $14,000 for dental bills incurred during 1972, 1973, and 1974, which she stated would have been paid by her health insurance plan if she had still been employed. She also produced checks for payments to the Health Insurance Plan of Greater New York (H.I.P.) for a period of about two and one- half years after her dismissal, aggregating $1078.04. The Den-

tal Expense Benefits plan which she offered in evidence covered only

> the maximum allowance shown in the Schedule of Covered Dental Expenses (pages 10, 11, 12 and 13) or the dentist's actual charges, whichever is less. (Emphasis from original.)

Plaintiff did not attempt to relate her dental bills to the schedules in the union's plan.

Defendant's attack on plaintiff's figures is focused on two points, first that she should be charged with earnings from her husband's real estate business during the time she was not working for the Board of Education, and second that her earnings would have been interrupted by a third pregnancy which occurred after her dismissal.

As to possible earnings from Mr. Buck's real estate business, there was testimony by both the plaintiff and her husband, as well as information from their joint income tax returns, which were made available at the

hearings only after prolonged resistance by both plaintiff and her husband. It appeared that what had previously been referred to as a real estate business represented merely ownership of a number of rental properties. A total of thirteen properties were jointly owned, and were rented to about 50 tenants. Mr. Buck's employment as an accountant had terminated in about 1970, and he devoted most of his time thereafter to managing these properties, including dealings with tenants, collection of rents, supervision of repairs, keeping records, and preparing tax returns. Plaintiff helped her husband in these matters, but only on a spasmodic basis. No one had been employed by Mr. Buck to assist in the management of the property before plaintiff's dismissal by the Board of Education. She therefore did not replace anyone who was previously on the payroll.

The court is satisfied that the work which plaintiff did in connection with real estate matters was no more than she could have done while working full time as a guidance counselor. Plaintiff and her husband treated their income and their bank accounts as a family unit. She was never paid anything for work on the properties they own.

Plaintiff made no real effort to obtain another job after her dismissal by the Board of Education. Any job as a guidance counselor would have had to be outside of the New York City system, and there was no showing that any such jobs were available. Another guidance counselor who was denied tenure in the New York City college system had to go outside New York State in order to find employment in his field. Esposito v. Board of Higher Education, 71-C-1463, Memorandum and Order dated June 11, 1974 -

E.D.N.Y. In fact, the court is not convinced that plaintiff was employable.

During the hearings on back pay, there was no further evidence taken with respect to whether plaintiff was actually competent to serve as a guidance counselor in 1970 or at the present time.

The substantial delay in disposing of this case is attributable in part to plaintiff's actions. Her joinder of many improper parties defendant brought about a series of successful motions to dismiss portions of the complaint. The press of other matters inevitably delayed the court in disposing of some of these motions. The court estimates that the matter might have been decided at least eighteen months earlier if the plaintiff's pleadings had been more concise and there had been less collateral proceedings to consider.

Plaintiff has three children, of whom two were born while she was working

for the Board of Education. She took seventeen weeks leave of absence in 1960-61 when the first child was born and eight months in 1967 when the second child was born. She asserts that these extended leave periods were not voluntary, but were compelled by an invalid regulation of the Board of Education. Plaintiff's third child was born on October 29, 1970. She claims to have worked at the Bryant Youth and Adult Center until one week before the birth, and from one week after the birth, with only fourteen days away from work. She asserts that it would be improper to charge her with more than fourteen days in connection with the birth of the third child, because the rights of a woman teacher in connection with pregnancy were liberalized after her second child was born

and, because she could have used accrued sick leave in order to cover any longer absence. There is no way to know how much time off she would have taken for the third child's birth if she had still been working for the Board of Education at the time. Since the work at the Bryant Center involved only one night a week, the time she took away from that job is not a fair indication of the time she would have had to take for a normal pregnancy.

Discussion

Jurisdiction over municipal agencies in civil rights actions has been limited recently as a result of the Supreme Court's holding in City of Kenosha v. Bruno, 412 US 507, 93 S.Ct. 2222 (1973). On its second motion to vacate this court's prior order, the Board of Education asserts that the City of Kenosha case governs and requires dismissal against it, and that James v.

Board of Education, 461 F.2d 566 (2d Cir.) cert. denied, 409 U.S. 1042, 93 S.Ct. 529 (1972) is no longer controlling. Defendant argues also that the James case was decided on the basis of violation of First Amendment rights, while in this case relief was granted only on the basis of a due process violation. However, back pay has been awarded also for violations of due process. Callaway v. Kirkland, 334 F. Supp. 1034 (N.D. Ga. 1971).

Many cases decided since City of Kenosha have dismissed actions for damages against boards of education on the ground that such bodies, like municipalities, are not "persons" under 42 U.S.C. §1983. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974); Seaman v. Spring Lake Park Independent School District, 387 F. Supp. 1168 (D. Minn. 1974); Howell v. Winn Parish School Board, 377 F. Supp. 816 (W.D. La. 1974);

Patton v. Conrad Area School District, 388 F. Supp. 410 (D. Del. 1975); Weathers v. West Yuma County School District, 387 F. Supp. 552 (D. Colo. 1974).

On the other hand, in Keckeisen v. Independent School District, 509 F.2d 1062 (8th Cir. 1975) the court distinguished a school board from a municipality, and held that the former was suable under §1983. In Singleton v. Vance County Board of Education, 501 F.2d 429 (4th Cir. 1974), the Court divided on the right to bring a §1983 suit against a school board. Attorneys' fees were ordered and a direction for back pay was approved in Cornist v. Richland Parish School Board, 495 F. 2d 189 (5th Cir. 1974), after Kenosha. Back pay has been ordered for another New York City employee who was dismissed without due process. Vega v. Civil Service Commission, 385 F. Supp. 1376 (S.D.N.Y. 1974). More-

over, the Supreme Court, after Kenosha, reinstated an order granting back pay in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 92 S.Ct. 711 (1974), rev'g same case, 474 F. 2d 395 (4th Cir. 1974), rev'g Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (E.D. Va 1971).

The Court of Appeals in this circuit has not dealt with the question, although in Forman v. Community Services, Inc., 500 F.2nd 1246 (2d Cir. 1974), in dealing with a claim against the New York State Housing Finance Agency under Section 1983, it stated that

> While municipal corporations, that is municipalities, are not deemed "persons" under the Civil Rights Act . . . "agencies" have always been so deemed.

No problem under the City of Kenosha case was mentioned by either of two completely different panels in two other decisions which remanded § 1983 actions for determination on the merits. Lombard v. Board

of Education, 502 F.2d 631 (2nd Cir. 1974), cert. denied, 95 S.Ct. 1400; Newman v. Board of Education, F.2d (2d Cir. January 6, 1975), cert. denied, 95 S.Ct. 1447.

Jurisdiction Under 28 U.S.C. § 1331

The question of jurisdiction over the New York City Board of Eduction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 need not be decided if federal question jurisdiction exists under 28 U.S.C. § 1331 (a). The necessary $10,000 jurisdictional amount is present in this case. Where there is an invasion of constitutional rights the courts have the inherent power to grant adequate relief, as was held in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971).

Jurisdiction over school bodies and relief against them have been upheld under § 1331. Reane v. Callisburg Independent

School District, 511 F.2d 633 (5th Cir. 1975); Cardinale v. Washington Technical Institute, 500 F.2d 791 (D.C. Cir. 1974); Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Penna. 1975). Cf. Adams v. Duval County School Board, 511 F.2d 690 (5th Cir. 1975).

Recognizing jurisdiction under § 1331 is in no way inconsistent with the City of Kenosha case. On the contrary, the court there directed the district court on remand to make findings on that question, because the stipulations of fact had failed to specify the amount in controversy. 412 U.S. at 514, 93 S.Ct. at 2227.

Recently, in Brault v. Town of Milton (2d Cir. February 24, 1975), the Court of Appeals for this circuit applied the Bivens rationale to a case alleging a due process

violation by a city. The court permitted a monetary recovery under §1331, saying that minicipalities have no "special status which would immunize them from suits to redress deprivations of federal constitutional rights." Slip. Op. at 1875.

In a pro-se complaint the fact that reference was made only to §1343 does not prevent the court utilizing §1331 to preserve rights which had been asserted two years before the City of Kenosha case was decided.

Other cases amply demonstrate that the Bivens rationale is not limited to Fourth Amendment cases, but can be the basis for monetary recovery for violations of a number of constitutional rights. See, e.g., States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974); United States ex rel. Moore v. Koelzer, 457 F.2d 892

(3d Cir. 1972); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975); Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973).

Nor is Edelman v. Jordan, 415 U.S. 751, 94 S.Ct. 1347 (1974), a bar to recovery here. In Edelman, the court said that the Eleventh Amendment bars the retroactive award of monetary relief - even under the rubric of "equitable restitution" - where the money will come directly from the state treasury. However, both the Supreme Court and lower courts have recognized that inferior bodies do not partake of Eleventh Amendment immunity merely because they may receive some state funds. See Edelman v. Jordan, supra, 415 U.S. at 651, 94 S.Ct. at 1358 n.12; Fay v. Fitzgerald, 478 F2d 181, 184 n.3 (2d Cir. 1973); Forman v. Community Services, Inc., et al., 500 F.2d 1246 (2d Cir. 1974); Smith v. Concordia

Parish School Board, 387 F. Supp. 887 (W.D. La. 1975); Young v. Hutchins, 383 F. Supp. 1167 (M.D. Va. 1974).

The Board of Education is primarily an organ of the City of New York and is not an alter ego of the state such as to possess Eleventh Amendment immunity.

Liability of Individual Board Members

The Supreme Court has held that individual board members have a qualified immunity with respect to all "good faith non-malicious actions taken to fullfil their official duties." Wood v. Strickland, U.S. , 95 S.Ct. 992, 999 (1975). It is true that the New York Education Law § 3020-a(4) requires that the findings and recommendations of a hearing panel be forwarded to the employee before a determination of disciplinary action under that section; but the defendant Board members here were acting pursuant to a long-standing

policy of the New York City Board of Education.

An additional relevant factor here is that the due process violations which took place in the dismissal of Mrs. Buck were all prior to the Supreme Court's clarification of the procedural rights of dismissed teachers in Board ofRegents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972) and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972). Given all the circumstances of this case, the individual board members should not be personally liable for a large back pay award.

Back Pay, Less Earnings

Since the defendant has based its motion to vacate entirely on the City of Kenosha rule, there is no need to review this court's finding that denial of due process must be remedied by a right to back pay, except to comment on plaintiff's assertion

that intermediate earnings should not be deducted. It is part of the normal requirement of mitigation of damages that someone who claims to have been deprived of earnings give credit for any earnings which were received during the period for which back pay is claimed. But the burden is on the employer to show that damages could have been mitigated. Smith v. Concordia Parish School Board, 387 F. Supp. 887 (W.D. La. 1975). Under state law, outside earnings are deductible from back salary after reversal of a disciplinary suspension. Picconi v. Lowery, 36 N.Y.2d 221, 366 N.Y.S. 2d 631 (1975); Jerry v. Board of Education, 35 N.Y.2d 534, 364 N.Y.S.2d 440, 445 (1974).

Amount of Back Pay

Plaintiff's lost earnings should be computed at the rate set forth in her affidavit from July 22, 1970 to July 16,

1975, the date of this memorandum and order, less three items (1) two months of 1970 to 1971 for the birth of her child, (2) eighteen months from January 16, 1974 to July 16, 1975 for delays occasioned by her conduct of the proceedings, and (3) $435.50 as earnings from the New York City Election Board.

The court estimates that she would have required three months absence from work for the birth of her child, and that one month of this would be covered by sick leave.

The court finds that no amount if chargeable to plaintiff as compensation for work she did for her husband, because it was unpaid work on family investments and because it was the type of work that could have been done in spare time if she had been fully employed.

The court finds that there is no show-

ing that plaintiff could have earned money in any other field, and that she is not chargeable with any default in mitigating damages, except as above determined.

The following is the computation of back pay that is receverable:

July 22 to September 30, 1970 at $16,434 per year for 71 days	$3,188.02
October 1, 1970 to September 30, 1971, less two months for child-birth, at $16,972 per year	14,143.33
October 1, 1972 to September 30,1972 at $17,992 per year	17,992.00
October 1, 1973 to September 8, 1973 at $19,072 per year, for 343 days	17,873.49
September 9, 1973 to January 16, 1974 at $20,222 per year for 130 days	7,202.35
Earnings at Bryant Youth and Adult Center to January 16, 1974	1,282.50
	$61,681.69
Less Election Board earnings	435.50
Net Award	$61,246.19

Plaintiff has not sustained the burden of shewing that the health insurance coverage provided by the Board of Education would have covered the dental bills she submitted, but she should recover the amount she expended for H.I.P. premiums, at $1,078.04.

Technically, plaintiff may be entitled to interest on the amount of back wages which she should have received, calculated at 6% from the date each monthly payment fell due. A fair approximation may be obtained, however, by computing interest on the total award from a median date.

The court finds that plaintiff is entitled to payment from the Board of Education of the City of New York of the sum of $62,324.23, with interest from April 16, 1972.

It is ORDERED that the Clerk enter judgment for that amount, with costs and disbursements.

/s/ ORRIN G. JUDD
U. S. D. J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 216, 372—September Term, 1976.

(Argued January 6, 1977 Decided April 20, 1977.)

Docket Nos. 75-7583, 75-7636

RUTH E. BUCK,

Plaintiff-Appellant-Appellee,

—against—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant-Appellee,

DR. BERNARD E. DONOVAN, DR. NATHAN BROWN, DR. IRVING ANKER, G. GARY SOUSA, SHELDON WEIN, MARY COHEN, MORTON SELUB, ELIZABETH O'DALY, JACOB ZACK, BEVERLY LIPSCHITZ, DAISY SHAW, MURRAY COHN, EVELYN KONIGSBERG, CHARLES FOY, SARAH BRAPHART, DR. NAOMI POOL, DR. MURRY G. FISCHER, DR. SIDNEY LEIBOWITZ, DR. SIDNEY ROSENBERG, DR. THEODORE LANG, DANIEL GUTMAN,

THE DIVISION OF HUMAN RIGHTS OF THE STATE OF NEW YORK, JOSEPH SPERAZI, WALTER OFFUT, JR., JEAN MACPHERSON, ARTHUR STERN,

THE COMMISSION ON HUMAN RIGHTS OF THE CITY OF NEW YORK, JOHN DOE, JAMES DOES (fictitious names), ROBERT PEREZ-WILSON,

THE NEW YORK STATE SUPERVISORY COMMITTEE, NORMAN FRANKEL, HAROLD G. ISRAELSON,

THE CORPORATION COUNSEL OF THE CITY OF NEW YORK, EDITH GORDON, CHARLES D. MAURER,

THE DISTRICT ATTORNEY OF THE BOROUGH OF BROOKLYN, JANE JONES, JOHN JONES, JAMES JONES, (fictitious names),

THE DISTRICT ATTORNEY OF THE BOROUGH OF MANHATTAN, JOHN SMITH (fictitious name), MICHAEL ALAN RICHMAN,

ABRAHAM MARK LEVIEN, WILLIAM GOFFEN, DAVID LUBASH, MARJORIE O'CONNELL,

Defendants.

Before:

MOORE, OAKES and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Eastern District of New York, Honorable Orrin G. Judd, *Judge*, dismissing complaint of Ruth E. Buck against several defendants but finding that The Board of Education of the City of New York had violated her right to procedural due process in an administrative hearing procedure that resulted in her dismissal.

Affirmed in part; reversed in part.

RUTH E. BUCK, Pro Se, Flushing, N.Y., *for Plaintiff-Appellant-Appellee.*

FRANCIS F. CAPUTO, Esq., New York, New York (W. Bernard Richland, Corporation Counsel of the City of New York, L. Kevin

Sheridan, of counsel), *for The Board of Education.*

LEONARD STECHER, Esq., New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Nicholas G. Garaufis, Deputy Assistant Attorney General, of counsel), *for Appellees Hon. Frederick Backer and employees of the District Attorneys of New York and Kings Counties.*

LAWRENCE W. REICH, Esq., Albany, New York (Robert D. Stone, of counsel), *for New York State Supervisory Committee.*

MOORE, *Circuit Judge:*

Plaintiff Ruth E. Buck, formerly a tenured guidance counselor employed by the Board of Education of the City of New York ("the Board"), commenced this action in 1971, pursuant to 42 U.S.C. §§1983, 1985 and 1986, against the Board and numerous other defendants, alleging that her discharge from school employment in 1969 deprived her of her civil rights. On December 2, 1974, the late Judge Judd of the Eastern District of New York entered a judgment in plaintiff's favor, and after further hearings determined to require the Board to pay Mrs. Buck $62,324.23 in back salary plus interest. The judgment was based on a finding that the administrative hearing procedure that resulted in Mrs. Buck's dismissal violated her right to procedural due process of law. Both Mrs. Buck and the Board appeal from differing aspects of the district court's decision.

I.

Mrs. Buck had been employed for over ten years in the New York City public school system before the events leading to her dismissal, serving most recently as a tenured guidance counselor at Franklin K. Lane High School in Brooklyn, New York.

In June, 1968, defendant Morton Selub, Principal of that High School, submitted a report to Dr. Sidney Leibowitz, Medical Director of the Board of Education, requesting that plaintiff be given a medical, *i.e.*, psychiatric, examination. Mr. Selub asserted that plaintiff had refused to follow the instructions of her supervisor, defendant Mary Cohen, the Administrative Assistant in charge of Guidance. The report also described several incidents of allegedly strange behavior by Mrs. Buck observed by Mr. Selub, Mrs. Cohen, and defendant Sheldon Wein, the school's Assistant Dean of Boys. Dr. Leibowitz agreed that plaintiff should be given the medical examination.

There followed an extended series of attempts to have Mrs. Buck undergo the examination. On July 25, 1968, Dr. Leibowitz asked her to appear on August 1. Mrs. Buck refused, saying that she had a prior engagement. On August 6, she was sent a notice of an appointment scheduled for August 27; she replied that she could not attend because she was planning to be out of town. The next notice scheduled the appointment for September 5, but Mrs. Buck responded that any appointment would have to await the opening of the school term.

On September 6, Mrs. Buck, represented by counsel, commenced a proceeding in New York state court seeking to rescind the order for the examination. The Superintendent of Schools, defendant Bernard Donovan, as a party to that state proceeding, agreed by stipulation not to compel the medical examination until the termination of the

litigation. As it happened, it was not until May 21, 1969 that the New York Supreme Court dismissed Mrs. Buck's petition, holding that the Board's examination request was not arbitrary, capricious or unreasonable.

The futile procession of scheduling notices was thereupon renewed. Mrs. Buck received notice of an examination scheduled for September 24, 1969, but replied that she would not attend because the notice had not been signed "by hand". The other notices called for an examination on October 15, a "Vietnam Moratorium" day; Mrs. Buck responded that she intended to "take that day off". A seventh notice dated October 16 was also unavailing, and an eighth notice called for Mrs. Buck's appearance on November 6, 1969.

After last-minute attempts to avoid the November 6 appointment, plaintiff went to the Board Medical Office, ostensibly to submit to the examination. But on her arrival she refused to sign in or fill out any forms until she had seen a supervisor. After waiting for a physician for approximately a half hour, she departed, saying that because it was three o'clock her working hours were over.

On the basis of these repeated refusals to appear for the medical examination, on December 5, 1969, the Acting Supervisor of Schools, defendant Nathan Brown, charged Mrs. Buck with insubordination and suspended her without pay.

The Board thereupon appointed a trial examiner to hear the case and to recommend what Board action, if any, was required. At the several hearings held by the examiner Mrs. Buck was represented by counsel (defendant David Lubash) and presented her case through witnesses, exhibits, and cross-examination of those witnesses called by the Superintendent. The trial examiner's findings are best summarized in his conclusion that plaintiff's

"intransigent defiance of authority, dictatorial attitude toward supervision, [and] continued evasion of a directive for medical examination which was issued in the prescribed and proper manner, are inexcusable." (Board's App. at 73.)

The examiner recommended that the Board permanently discharge Mrs. Buck from further employment, though he suggested that it first consider offering her one last chance to retain her job by submitting to the examination.

Mrs. Buck was informed by letter that the Board would consider the matter of her suspension at its public meeting on July 22, 1970. She decided to attend the Board's meeting, apparently against the advice of her counsel, but her tardy arrival meant that she missed the Board's consideration of her case and its publicly-announced decision to make her discharge permanent.

On July 23, 1971, appearing *pro se*, Mrs. Buck commenced the instant action in the district court. Her original complaint included as defendants virtually everyone with whom she had been in contact in connection with the proposed medical examination. The thrust of her complaint was that the direction to report for a medical examination was an instance of harassment directed at her by the largely Jewish hierarchy in the city school system because of her white, Anglo-Saxon, Protestant ancestry and her refusal to participate in teacher strikes during 1967 and 1968.

On pretrial motions, Judge Judd dismissed the complaint as against most of the named defendants and *sua sponte* added as an issue for trial, *inter alia*, the question of whether Mrs. Buck was denied due process by the Board's reaching its decision prior to providing her with a copy of the trial examiner's report.

On December 2, 1974, Judge Judd rendered his decision, holding that Mrs. Buck had failed to prove that the request for a medical examination was in any way prompted by ethnic prejudice or retaliation for her anti-strike attitude. But the court also found that the administrative hearing procedure followed by the Board violated Mrs. Buck's right to procedural due process. She was subsequently awarded over $60,000 in back pay plus interest. The Board appeals from the finding of a due process violation and the fixing of liability upon it. Mrs. Buck also appeals, appearing *pro se* to contend, *inter alia*, that the district court erred in dismissing the complaint against many of the original defendants and in computing the damage award.

II.

Mrs. Buck's position as a tenured guidance counselor is indisputably a property interest encompassed within the fourteenth amendment's due process protection. *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). Thus, the parties to this case agree that she could not be permanently discharged from employment without adherence to the procedural protections which are guaranteed her by the due process clause.

At issue here, rather, is the exact measure of procedural protection to be accorded Mrs. Buck. The district court reasoned that her failure to receive a copy of the trial examiner's report before the Board meeting at which the final decision in her case was rendered in itself amounted to a constitutional violation. As the court below reasoned,

"a person who faces dismissal should have a right to see the report before the Board acts on it and to argue with respect to the action to be taken on it." (Board's App. at 124, as modified at 130.)

However, the district court erred by placing excessive emphasis on the particular course of the report of the trial examiner. In reviewing state action in the area of procedural due process, federal courts must look to the whole substance of a proceeding, not merely to its bare form, in determining whether the process at issue abides by the constitutional minimum of protection. *Bell* v. *Burson*, 402 U.S. 535, 541 (1971). In that analysis the courts must "fully [realize] . . . that the interpretation and application of the Due Process Clause are intensely practical matters," *Goss* v. *Lopez*, 419 U.S. 565, 577-78 (1975), and must be mindful of

> "the importance of not imposing upon the States or the Federal Government . . . any procedural requirements beyond those demanded by rudimentary due process." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970).

The exact procedures mandated by due process will vary from one context to another. *Bell* v. *Burson, supra*, at 540, for the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). Of course, it has long been recognized that the fundamental requisite is that the person who is to be deprived of a protected interest be given adequate notice of the proceeding and the charges alleged, as well as afforded a fair opportunity to be heard. *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1863); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). In the specific context of educational employment, the Supreme Court has expressed the due process standard as requiring a hearing where the employee can be informed of the grounds for his or her possible discharge and can challenge their suffi-

ciency. *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972). *Cf. Goss* v. *Lopez, supra*, 419 U.S. at 579 (public high school students facing suspension entitled to "*some* kind of notice and . . . *some* kind of hearing") (emphasis in original).

The facts of this singular case reveal that the Board's procedure satisfied this standard with regard to Mrs. Buck. Mrs. Buck was afforded explicit notice of the allegations raised against her. She received a complete written statement of the Superintendent's charges and specifications as early as the decision to suspend her, and she confronted the full case against her later in the hearings before the trial examiner. Moreover, she was given ample opportunity by the trial examiner to explain or contradict the charges in an adversarial context. She was represented by counsel, who took full advantage of the chance to present her defense, using witnesses, exhibits, and extensive cross-examination of those who testified for the Superintendent.

In addition, the meeting at which the Board formally made its decision was open to the public and offered Mrs. Buck another effective opportunity to contest the charges against her. It was Mrs. Buck's absence, not Board procedure, which prevented her inclusion in the discussion of the matter at that time of final decision.

We also note that, at the time, neither Mrs. Buck nor her lawyer seemed to place great significance on the trial examiner's report: they did not request a copy of it from either the Board or the examiner, nor did they make any effort to learn the substance of its recommendations.[1] At

---

1 The dissent makes much of the "risk" that Mrs. Buck had "no idea" of the contents of the trial examiner's report. Mrs. Buck did make the allegation of lack of knowledge in her affidavit of May 7, 1974. But Judge Judd carefully avoided endorsing her assertion; he noted only that there was nothing in the record expressly contradicting it. His

no time in these proceedings has Mrs. Buck pointed to any evidentiary or conclusory irregularity in the examiner's report or recommendation. We have held in the context of selective service regulations that such a failure to establish any harm or prejudice will preclude a finding of procedural violation. *Nurnberg* v. *Froehlke,* 489 F.2d 843, 848 (2d Cir. 1973). *See also United States* v. *Bellmer,* 404 F.2d 132, 135 n.6 (3d Cir. 1968); *United States* v. *Ford,* 478 F.2d 169, 174-75 (1st Cir.), *cert. denied,* 414 U.S. 872 (1973).

The district court cited only two federal cases in support of a finding of a procedural defect here. Both concern procedures established by statute and regulation to govern selective service classifications, and both fail to lend precedential credence to the determination below. In *Rohe* v. *Froehlke,* 500 F.2d 113 (2d Cir. 1974), a member of the United States National Guard failed to report for a required training session, claiming that he had been ill and confined to his home. His unit commander disbelieved the excuse and ordered that Rohe be called for active duty. Rohe was advised that, pursuant to Army regulations, he could appeal his commander's decision to the Assistant Adjutant General. He did, but he received no evidentiary hearing at all, and was not even informed of relevant factual allegations which his commanding officer was, without his knowledge, continually supplying the Assistant Adjutant General. This court held that the Army regulations which provided Rohe with the opportunity to appeal his commander's decision implicitly required that the

caution was well-taken, for common sense belies any assertion that one who participates in a fully adversarial, evidentiary hearing regarding her own conduct would not be familiar with the basic substance of the trial examiner's report. *See Blanton* v. *State University of New York,* 489 F.2d 377, 385-86 (2d Cir. 1973). Indeed, an assumption of lack of knowledge makes entirely unintelligible the failure of Mrs. Buck or her attorney to request a copy of the report prior to the public Board meeting.

appellate process allow Rohe *some* opportunity to respond to his commander's *ex parte* allegations. Here, by contrast, Mrs. Buck not only had a full, adversarial evidentiary hearing, but had available to her the opportunity to respond to the trial examiner's recommendation at the Board's public meeting.

The second case cited, but not discussed, by the district court is *Gonzales* v. *United States,* 348 U.S. 407 (1955), where the Supreme Court held as a matter of statutory construction that the Military Selective Service Act in effect at that time, 62 Stat. 604 *et seq.* (1948), *as amended,* 50 U.S.C. §451 *et seq.,* required that a candidate whose application for conscientious objector status was being considered be afforded an opportunity to present a reply to the Justice Department's recommendation of denial in his case. Gonzales, a Jehovah's Witness, was denied conscientious objector status by his local draft board. He duly appealed to the Appeals Board of the Selective Service, which referred his case to the Justice Department for an investigation. An informal hearing was held before a Department hearing officer who recommended a denial of conscientious objector status. The Department of Justice in its report to the Appeals Board made the same recommendation and the Appeals Board approved the denial.

The significant failure of this procedure, the defect which the Supreme Court considered fatal and which is crucial to our understanding of that case's relevance here, is that, under the statutory scheme before the Court, Gonzales was *at no time* either notified of the Appeals Board's renewed consideration of his case after receipt of the Department's report, or given an opportunity to appear or file a reply in response to the Department's recommendation. 348 U.S. at 410-11. The Court's reasoning made clear that it was primarily the regulatory scheme's

failure to allow for an effective opportunity for Gonzales to appear before the Board to dispute the Department's recommendation which rendered his classification invalid. 348 U.S. at 412-13.

The circumstances of the case before us show that Mrs. Buck was not deprived of an opportunity to rebut the recommendation of the trial examiner. She was informed fully one week in advance that her case would be considered at an upcoming public meeting of the Board of Education. There is no evidence in the record suggesting that had Mrs. Buck been present when her dismissal was discussed she would not have been afforded a full opportunity to present her views in response to the trial examiner's recommendation. She cannot reasonably claim that the procedural treatment accorded her failed to guarantee that fundamental fairness which is the heart of due process.

Mrs. Buck's interest in retaining her job was obviously a strong one. But there was little practical risk that she would be erroneously discharged after the full evidentiary hearing before the trial examiner and an opportunity to state her case in public before the Board. Thus, we cannot say that in this case the due process clause mandated a rigid rule requiring the Board to provide Mrs. Buck with the trial examiner's report prior to the Board's public meeting.

In a recent opinion concerning the scope of procedural due process in the context of public education, the Supreme Court repeated an admonition against excessive judicial interference with any local procedure which, under the circumstances presented, provides the constitutional minimum of protection:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education

> in our Nation is committed to the control of state and local authorities." *Goss* v. *Lopez, supra,* 419 U.S. at 578, quoting from *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968).

The facts of this case reveal that Mrs. Buck was afforded clear notice of the charges being brought against her and was allowed ample opportunity to present her views in rebuttal. The due process clause, in this case, requires no more.

In light of our holding, it is not necessary for us to consider the other issues raised on appeal. The judgment of the district court finding a violation of the fourteenth amendment is reversed. The district court's pretrial dismissal of defendants is affirmed.

OAKES, *Circuit Judge* (dissenting):

It is conceded by all that, as the majority opinion states, "Mrs. Buck's position as a tenured guidance counselor is indisputably a property interest encompassed within the fourteenth amendment's due process protection" and that "[her] interest in retaining her job was . . . a strong one." The majority and I are also in agreement that the federal courts should avoid "excessive interference" with constitutionally adequate local procedures, a proposition with which Judge Judd below expressed concurrence. He wrote:

> The question is not . . . the discretion of the Board of Education in determining the outcome, but the procedure of the Board in deciding a contested matter without affording plaintiff a proper hearing.

On this question, the majority and I part company.

It is important at the outset to emphasize the nature of the procedure at stake in this case. The majority speaks

of the due process clause as not mandating a "rigid rule," but it never indicates how the School Board would have been burdened by sending to Mrs. Buck, prior to the Board meeting, a copy of the trial examiner's report that it sent to her after the meeting. Nor does the majority indicate what rigidity would arise from allowing a tenured teacher or counselor facing possible dismissal to respond, either orally or in writing, to charges in the examiner's report before the Board makes a final decision. In contrast to the situation in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), where it appeared that the Government would have to spend substantial additional sums if the procedures at issue were adopted, *see id.* at 348-49, here there is little likelihood that any additional sums will be spent if the State is required to give a tenured teacher or counselor the examiner's report and an opportunity to respond prior to dismissing him or her.

The majority opinion repeats several times its conclusion that Mrs. Buck did have an opportunity to respond prior to the Board's decision, an opportunity that, one would gather from the majority opinion, she lost only because of her own tardiness (she arrived at the Board meeting 15 minutes late). This conclusion, however, ignores both common sense and trial court findings of fact that we are bound to accept unless "clearly erroneous," Fed. R. Civ. P. 52(a). The majority offers no explanation as to how one can intelligently respond to a report one has not seen, particularly when, as Judge Judd found here, the one who is supposed to be responding has "no idea" what the report contains.[1] *See In re Gault*, 387 U.S. 1,

1 The judge's finding in his Memorandum of Decision of December 2, 1974, was:

> No explanation is given of how plaintiff is supposed to have known the contents of a report which had not been disclosed to her. Her affidavit of May 7, 1974 states that she had no idea what the report contained and no idea that she was actually being dismissed. Nothing to the contrary was developed at the hearing before the court.
>
> [Mrs. Buck's attorney] wrote to the Board on July 27, 1970, after receiving the report, and pointed out that plaintiff had not been given a new opportunity to submit to a medical examination as had been recommended by the trial examiner, and that she was now ready to submit.

33-34 & n.54 (1967). Even the most skilled of lawyers might have difficulty accomplishing such a feat. Moreover, even assuming that she knew what the report contained as to facts, without seeing it she could not know what recommendations were made by the trial examiner.

As for Mrs. Buck's tardiness in attending the Board meeting, it was essentially irrelevant. The majority does not challenge Judge Judd's finding, based on the testimony of a Board member, that the actual decision to fire Mrs. Buck was made at an informal meeting prior to the public, formal meeting at which Mrs. Buck appeared. Hence the "opportunity" to which the majority refers was at best an opportunity to respond to a *fait accompli* on a subject as to which she was given no guidance until after the time for response had passed.

It is true that, as the majority opinion emphasizes, Mrs. Buck had a hearing before a Board-appointed trial examiner. The adequacy of that hearing is not questioned, but it hardly follows that the hearing alone meant there was, in the majority's words, "little practical risk that she would be erroneously discharged." The reasoning of the Supreme Court in *Gonzales* v. *United States*, 348 U.S. 407 (1955), cited by the court below, is instructive on this question. In *Gonzales*, a man contesting his draft board's denial of conscientious objector status was given a hearing before an examiner as part of the administrative process. The examiner's report and the ensuing Justice Department recommendation based on it were forwarded to

an "Appeal Board," which in such cases acted not in an appellate capacity but rather as "the only decision-making body to pass on the entire file." *Id.* at 413. Neither the report nor notice of the recommendation was "given petitioner prior to the Appeal Board's decision." *Id.* at 410-11. The Supreme Court held that, under the statute in question as well as "underlying concepts of procedural regularity and basic fair play," the petitioner had to be given "a copy of the recommendation of the Department . . . at the time it is forwarded to the Appeal Board, and . . . an opportunity to reply." *Id.* at 412. The constitutional due process underpinning of this holding has been recognized explicitly by the First Circuit, *Crotty* v. *Kelly*, 443 F.2d 214, 217 (1st Cir. 1971), and implicitly by our court and the Third Circuit, *Rohe* v. *Froehlke*, 500 F.2d 113, 116 (2d Cir. 1974); *Hoffmann-LaRoche, Inc.* v. *Kleindienst*, 464 F.2d 1068, 1072 & n.6 (3d Cir. 1972).

The reasons advanced by the *Gonzales* Court for imposing procedural requirements similar to those sought by Mrs. Buck go directly to the possibility of an erroneous decision, which the majority here treats so lightly. The Court pointed out that, if a person is not "cognizant of all the facts" possessed by the final decisionmaking body and of the position of the one recommending a decision, he or she cannot present an effective case, and the decisionmakers cannot be sure that they possess "*all* of the relevant data." 348 U.S. at 413 (emphasis in original). Particularly given the advisory nature of the Justice Department's recommendation, the *Gonzales* Court ruled, it was essential that the person affected "be given an opportunity to rebut [the] recommendation when it comes to . . . the agency with the ultimate responsibility for [decision]." *Id.* at 412. Similarly, in the instant case the School Board had "ultimate responsibility," *Buck* v. *Brown*, No. 11086/69 (N.Y. Sup. Ct. Mar. 20, 1970), with the examiner's report being ad-

visory, as he recognized by making "recommendations" to the Board.

The risk of error here is even more significant than in *Gonzales*, moreover, since here there was testimony from a Board member that only one of the five members would read the material in a given case. It is obvious from this testimony that the Board placed principal reliance on the trial examiner's report, rather than on the record developed at the hearing, and in such circumstances it becomes particularly critical that the person affected be given an opportunity to challenge the examiner's findings and conclusions before any decision is made. Without such an opportunity, the entire decision rests on the findings of one person, the trial examiner, who, no matter how conscientious, will occasionally make mistakes. *Compare Mathews* v. *Eldridge, supra*, 424 U.S. at 343-47, 349 (procedures for making initial disability determination were very reliable, and claimant had right to full hearing and judicial review before denial of claim became final).[2]

The degree of risk of error deemed acceptable, of course, is related to the seriousness of the consequences for the individual if an erroneous decision is made. *See Mathews* v. *Eldridge, supra*, 424 U.S. at 341-42; Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1278, 1295-1304 (1975). Here the Board's action—dismissal from a tenured position—was plainly quite serious, as the majority recog-

---

2 *See also* Administrative Procedure Act, 5 U.S.C. §557(c), which provides in part:

> Before . . . a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit . . .
>
> . . .
>
> exceptions to the . . . recommended decisions of subordinate employees . . . and
>
> supporting reasons for the exceptions . . . .

nizes; the dismissal "depriv[ed] a person of a way of life to which [s]he has devoted years of preparation and on which [s]he and [her] family have come to rely," Friendly, *supra*, 123 U. Pa. L. Rev. at 1297 (revocation of professional licenses). When such serious consequences are involved, procedures that substantially reduce the risk of error at low or no cost to the public are mandated by the due process clause. *See Mathews* v. *Eldridge, supra*, 424 U.S. at 334-35.

Because I conclude that Mrs. Buck was denied due process of law, this dissent must reach two other issues raised by the School Board. The first involves the argument that, because Mrs. Buck brought certain state actions in which she could have, but did not, raise her Fourteenth Amendment claim, she is barred by res judicata from raising that claim here. As the Board recognizes, however, the identical argument was rejected by this court in *Lombard* v. *Board of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975), an action brought under 42 U.S.C. § 1983, and the *Lombard* holding was applied to actions brought directly under the Fourteenth Amendment by the panel majority in *Brault* v. *Town of Milton*, 527 F.2d 730, 733 n.5 (2d Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2d Cir. 1975). I would follow these cases here and hold that Mrs. Buck's federal action is not barred by the doctrine of res judicata.

The second issue raised by the Board involves the validity of a direct suit under the Fourteenth Amendment in a situation in which, because of the doctrine of municipal immunity, *Monroe* v. *Pape*, 365 U.S. 167 (1961), applied by our court to school boards in *Monell* v. *Department of Social Services*, 532 F.2d 259 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (No. 75-1914), a

suit under 42 U.S.C. § 1983 cannot be brought.[3] The panel majority in *Brault* v. *Town of Milton, supra*, held that such a direct suit was available, and the en banc majority, in reversing, explicitly declined to reach the question, 527 F.2d at 738. I would follow the *Brault* panel decision in this case. The decision is directly supported by Judge Moore's decision for a unanimous panel in *Matherson* v. *Long Island State Park Commission*, 442 F.2d 566 (2d Cir. 1971), as well as by a "well-developed body of case law" in other circuits, 1 N. Dorsen, P. Bender & B. Neuborne, *Political and Civil Rights in the United States* 1543 (4th ed. 1976). *See, e.g., Cox* v. *Stanton*, 529 F.2d 47, 50-51 (4th Cir. 1975); *Fitzgerald* v. *Porter Memorial Hospital*, 523 F.2d 716, 718-19, n.7 (7th Cir. 1975) (Stevens, *J.*), *cert. denied*, 425 U.S. 916 (1976); authorities cited in *Brault* v. *Town of Milton, supra*, 527 F.2d at 744 (dissenting opinion). I would therefore hold that Mrs. Buck may sue the School Board under the Fourteenth Amendment, with jurisdiction premised on 28 U.S.C. § 1331.[4]

In all other respects, I agree with Judge Judd. I would affirm his judgment for Mrs. Buck and therefore I dissent.

---

3 In *Mt. Healthy City School District Board of Education* v. *Doyle*, 45 U.S.L.W. 4079 (U.S. Jan. 11, 1977), the Supreme Court expressly left "for another day"—which evidently is not far away—the questions whether a school board is a "person" for purposes of 42 U.S.C. § 1983, and, if it is not, whether a suit against the Board may nevertheless be sustained as a direct constitutional action, with jurisdiction premised on 42 U.S.C. § 1331. 45 U.S.L.W. at 4081.

4 Mrs. Buck alleged (and was awarded) damages substantially in excess of $10,000.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of May, one thousand nine hundred and seventy-seven

Present: HON. LEONARD P. MOORE,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges

----------x

RUTH E. BUCK,

Plaintiff-Appellee-Appellant-Appellee,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants-Appellees-Appellants.

----------x

75-7583
75-7636

A petition for a rehearing having been filed herein by Ruth E. Buck, Pro Se.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/S/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk.

APPENDIX C - ORDER OF THE SUPREME COURT OF THE UNITED STATES

No. A-152

RUTH E. BUCK,

Petitioner

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of petitioner

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 16, 1977.

/s/ Lewis F. Powell
Associate Justice of the Supreme Court of the United States

Dated this 16th day of August 1977.